SUPREME COURT OF THE UNITED STATES.

No. 701.

ROBERT ERWIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims, December term, A. D. 1872.

ROBERT ERWIN
vs.
THE UNITED STATES. } No. 6855.

I.—*Petition.—Filed January* 6, 1873.—*J. R.*

To the honorable the chief justice and judges of the United States Court of Claims:

Your petitioner, Robert Erwin, a resident of the city of Savannah, in the State of Georgia, respectfully represents:

That on the 21st day of December, A. D. 1864, he was the exclusive owner in his own right of two hundred and eighty-three bales of upland cotton, situated, stored, and marked as follows: Twenty-nine (29) bales marked "J. P. A."; fifty (50) bales, no marks; twenty-four (24) bales marked "W. H. W."; seven (7) bales marked "P. S.", all stored at No. 8, Jones's building, north side of Bay street, below Drayton, on wharf, in the city of Savannah aforesaid; sixty-five (65) bales marked [O], stored in No. 6 of above building, on alley-way; forty-two (42) bales marked [E], stored in No. 3 of above building, on alley-way; fifty (50) bales, no marks, stored in No. 8 of above building, on wharf; seven (7) bales marked [T D], stored at Demond's Press; nine (9) bales marked [T D], stored in No. 3 of Jones's building above named.

2 Your petitioner further represents that on or about the 24th day of December, 1864, the said city of Savannah was captured and occupied by the United States military forces, under command of Major-General W. T. Sherman; and your petitioner further states that after the occupation of the said city of Savannah as aforesaid, and some time in the month of February, A. D. 1865, but the exact date your petitioner is unable to state, the said two hundred and eighty-three bales of cotton, so as aforesaid owned by and in the possession of your petitioner, was seized and taken possession by the said military authorities for and on behalf of the United States; and your petitioner avers that the said cotton, so as aforesaid seized by the said military authorities, was afterwards, and in the month of March, A. D. 1865, transferred and turned over by the said military authorities to a Treasury agent of the United States.

And your petitioner further states that the said cotton was subsequent thereto sold by the Treasury agent for and on account of the United States, and the proceeds of the sale of the said cotton paid into the Treasury of the United States.

And your petitioner further states that he is informed and believes that the proceeds of the said cotton so as aforesaid seized and taken from his possession by the said military authorities, and sold by the said agent of the United States Treasury Department, amounted to the sum of fifty thousand dollars.

And your petitioner further states that the said cotton was not, nor was any part thereof, ever abandoned by your petitioner to the United States; nor was the same liable to seizure under the laws and usages of war; nor was the said cotton, or any part thereof, ever condemned as forfeited to the United States by any judicial proceedings instituted for that purpose either against the said cotton or against your petitioner as the owner thereof.

3 Your petitioner further avers that the United States retains and holds the proceeds of the said cotton only as trustee, and

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Your petitioner, Robert Erwin, a resident of the city of Savannah, in the State of Georgia, respectfully represents:

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And your petitioner further states that the said cotton was subsequent thereto sold by the Treasury agent for and on account of the United States, and the proceeds of the sale of the said cotton paid into the Treasury of the United States.

And your petitioner further states that he is informed and believes that the proceeds of the said cotton so as aforesaid seized and taken from his possession by the said military authorities, and sold by the said agent of the United States Treasury Department, amounted to the sum of fifty thousand dollars.

And your petitioner further states that the said cotton was not, nor was any part thereof, ever abandoned by your petitioner to the United States; nor was the same liable to seizure under the laws and usages of war; nor was the said cotton, or any part thereof, ever condemned as forfeited to the United States by any judicial proceedings instituted for that purpose either against the said cotton or against your petitioner as the owner thereof.

3 Your petitioner further avers that the United States retains and holds the proceeds of the said cotton only as trustee, and

has no right or title to the proceeds of the sale of said cotton except as trustee; and is under an implied obligation to pay the same to your petitioner upon your petitioner making such proof as the law requires, to entitle him to such proceeds.

Your petitioner further states that he aided, abetted, and gave encouragement to the late rebellion, being at one time an officer in the Confederate army; and that he was one of those persons to whom amnesty and pardon was granted by the proclamation of the President of the United States, dated December 25, A. D. 1868, and that by the said proclamation your petitioner was restored to all rights of property, including the right to the proceeds resulting from the sale of the said cotton by the United States, as well as the right to institute a suit for such proceeds against the United States in this court.

Your petitioner further states that from the commencement to the close of the late rebellion he resided in States declared by the several proclamations of the President of the United States to be in rebellion against the government and authority of the United States.

Your petitioner, therefore, by reason of the premises, prays judgment against the United States for the proceeds of the said two hundrrd and eighty-three bales of cotton, so as aforesaid held in trust by the United States, amounting to the said sum of fifty thousand dollars.

JOHN J. WEED,
Solicitor for Claimant.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Joseph B. Stewart, being duly sworn, on his oath states that he is attorney in fact for the claimant named in the foregoing petition, under a power of attorney filed herewith, and dated March 1, 1865; and
4 that no assignment or transfer of the claim stated and set forth in the said petition, or of any part thereof, or any interest therein, has been made; that the claimant in the said petition is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in the said petition are true.

JOS. B. STEWART,
Attorney in fact for Robert Erwin.

Sworn to and subscribed before me this 3d day of January, A. D. 1873.

[L. S.] J. L. ROBERTS,
Notary Public.

Post-office address of claimant, Savannah, Georgia.
Post-office address of claimant's solicitors, Washington, D. C.

5 II.—*Traverse.*—*Filed March* 10, 1873.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of fifty thousand dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government

of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said government, denies the said allegation.

W'M MCMICHAEL,
Assistant Attorney-General.

6 III.—*Motion for leave to file amended petition.—Filed February* 16, 1877.

And now the claimant, by John J. Weed, his attorney, comes this day and moves the court for leave to file an amended petition in the above-entitled cause, which amended petition, and printed copies thereof, are herewith submitted.

JOHN J. WEED,
Attorney for Claimant.

BEN'J F. BUTLER,
ENOCH TOTTEN,
Of Counsel.

Upon the foregoing motion the judge at chambers made the following ruling, to wit:

Allowed.

EDWARD G. LORING, *Judge.*

7 ROBERT ERWIN
vs.
THE UNITED STATES. } No. 6855.

IV.—*Amended petition.—Filed Feb.* 16, 1877.

To the honorable the chief justice and judges of the United States Court of Claims:

The claimant, by leave of the court for that purpose first had and obtained, comes and files herein his amended petition, and states and shows to the court the following additional facts, viz:

1. That subsequent to the filing of the original petitions herein, your petitioner proceeded to take such certain and sufficient evidence as would sufficiently establish the facts stated and set forth in such original petition; and that your petitioner did cause such evidence to be filed in said cause and printed, as required by the rules of this court.

2. That subsequent to the filing and printing of such evidence, the Supreme Court of the United States, in the case of Haycraft vs. The United States (22d Wallace, 81), decided and declared that this court had not jurisdiction to hear and determine any claim or cause of action under the provisions of the act of March 12, 1863, unless such claim or cause of action had been filed or instituted in this court within two years from the 20th day of August, A. D. 1866.

8 3. That it having been thus decided and declared that this court had not jurisdiction of the claim stated and set forth in your petitioner's original petition herein, your petitioner thereupon applied to and petitioned the Congress of the United States to pass an act for the relief of your petitioner, and to confer upon this court authority and jurisdiction to hear and determine the several claims and causes of action which your petitioner had theretofore filed and were pending and undetermined in this court.

4. That the result of such application to Congress was the passage by that body of an act in the words and figures following, viz:

"*An act for the relief of Robert Erwin.*

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

And your petitioner further states that the said act, so as aforesaid passed by Congress, has become a law.

5. And your petitioner further states that Congress, in passing the above-entitled act for the relief of your petitioner, conferred upon this court, and intended to confer upon this court, authority and jurisdiction to hear and determine the several claims and causes of action stated and set forth in your petitioner's original petition herein, as well as those stated and set forth by your petitioner in the suit instituted by your petitioner in this court on the 6th day of January, A. D. 1873,
9 and being case No. 7914 of the causes on the general docket of this court; and your petitionor, in order that the purpose and object of Congress in passing the above-entitled act may become more apparent, attaches hereto the report of the Judiciary Committee of the honorable the House of Representatives upon the bill for the relief of your petitioner, which had been previously referred to that committee for examination and report; and your petitioner marks the said report Exhibit A, and prays that the same may be taken as a part of this your petitioner's amended petition.

And your petitioner further states that at the time he petitioned Congress for the passage of an act for his relief, as well as at the time of the passage of the above-entitled act, your petitioner had no other claims or causes of action against the United States, except those then pending and undetermined in this court.

Your petitioner, therefore, prays judgment as in and by his original petition herein he has already prayed.

JOHN J. WEED,
Attorney for the Claimant.
BENJ. F. BUTLER,
ENOCH TOTTEN,
of Counsel.

DISTRICT OF COLUMBIA,
City and County of Washington, ss:

Robert Erwin, the claimant named in the foregoing amended petition, being duly sworn, on his oath states that the matters and things stated and set forth in the said petition are true; and that no assignment or transfer of the said claim stated in this petition, or of that stated in the original petition herein, has been made, nor has any part of such
10 claim or interest therein been assigned; and that your petitioner is justly entitled to have judgment against and recover from the

United States the amount claimed in the original petition of your petitioner herein filed.

ROBERT ERWIN.

Subscribed and sworn to before me this 14th day of February, 1877.
[L. S.] S. F. AUSTIN,
Notary Public.

11 EXHIBIT A.

House of Representatives. Report No. 6. 44th Congress, 1st session.

ROBERT ERWIN.

[January 18, 1876.—Ordered to be printed.]

M'r Caulfield, from the Committee on the Judiciary, submitted the following report (to accompany bill H. R. 231):

The Committee on the Judiciary, to whom was referred the bill (H. R. No. 231) for the relief of Robert Erwin, respectfully submit the following report:

The evidence adduced by the memorialist in support of his application shows the following state of facts: That the memorialist, at the time of the capture of the city of Savannah by the military forces of the United States, in December, 1864, claimed to be the owner of two certain lots of cotton, one of which was in his possession in the city of Savannah, and stored in his warehouse, and the other lot was stored in Thomasville, Ga.; that both of these lots of cotton are alleged by memorialist to have been seized by the officers and agents of the United States, and subsequently shipped by said agents to the city of New York, and there sold by such agents, and the proceeds of the sale thereof paid into the Treasury of the United States—allegations sustained by the proof adduced; that the memorialist, for the purpose of making claim against the United States for the proceeds of the said lots of cotton in the Court of Claims, under the provisions of the act of March 12, 1863, entitled "The Abandoned or Captured Property Act," employed Joseph B. Stewart, an attorney and counsellor at law in the city of Washington, as his attorney, for the purpose of instituting a suit in the Court of Claims, as provided by the above-named act, and for that purpose the memorialist placed in the hands of his said attorney all the papers relating to said claims; that there is no doubt that the
12 memorialist was led to believe, by the repeated statements or representations of the said Stewart, that suits in the name of the memorialist for the proceeds of the said lots of cotton had been instituted in the said Court of Claims within the time limited by law; that the said Stewart neglected or failed to have the suits for the said lots of cotton instituted in the Court of Claims, as he had represented to the memorialist had been done; and that the memorialist was not informed that the suits were not instituted until the time limited by law for commencing them had expired, and then the memorialist employed another attorney, who brought the said suits in the Court of Claims, but, under the decision of the Supreme Court, not within the time limited by law; that the memorialist was not guilty of any negligence or default, but made all proper efforts to secure his right to the proceeds of the said lots of cotton in the only way which the law provided for him, and that the injury and loss sustained by him are the result of the negligence or default of his said attorney.

Your committee agree that the above facts establish a case of hardship, and that the bill to enable the Court of Claims to take jurisdiction of the case of the memorialist should be passed. Your committee find that this bill received the unanimous report of the Committee on the Judiciary of the last Congress, and was passed by the House without opposition.

13 V.—*Petition of Lepine C. Rice, assignee in bankruptcy of Robert Erwin, to intervene, and order of the court overruling same.—Filed March* 14, 1877.

The petition of Lepine C. Rice, of Savannah, in the State of Georgia, respectfully represents:

That on or about the sixth day of January, 1873, the above-named Robert Erwin exhibited his petition in the above-entitled cause, under the provisions of the act of Congress of March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in the insurrectionary districts within the United States," praying this honorable court to award to him the payment of the net proceeds of the sale of certain captured property particularly specified in said petition; that by an act of Congress of February 5, 1877, the said court was authorized to take jurisdiction of said petition and claim; and that such proceedings have been thereupon had that the said cause now remains pending and undetermined in said court.

14 Your petitioner further shows that on or about the thirty-first day of December, in the year 1868, the said Robert Erwin and one Charles S. Hardee filed in the district court of the United States for the southern district of Georgia their petition, praying to be adjudged bankrupts; that such proceedings were thereupon afterwards had that on the 15th day of January, 1869, and long before the time of filing of said Robert Erwin's said petition in this court, the said Robert Erwin and the said Charles S. Hardee were adjudged bankrupts, and a certain Robert H. Footman was duly appointed their assignee under the provisions of the laws of the United States in that behalf; and that by an order of the said district court, bearing date the twenty-third day of February, 1877, the resignation of said Robert H. Footman as such assignee was accepted, and your petitioner was appointed such assignee to succeed said Robert H. Footman, as will appear by reference to a duly certified copy of said order herewith filed as part of this petition, marked "Exhibit L. C. R., No. 1."

15 Your petitioner further shows that the said claim of the said Robert Erwin against the United States was not contained among the assets of the said Robert Erwin and the said Charles S. Hardee, or either of them, in the certified copy of the schedules of creditors and assets of said Erwin and Hardee furnished to said Footman, assignee, by the register in bankruptcy, as will appear by inspection of said certified copy herewith filed as part of this petition, marked "Exhibit L. C. R., No. 2," and by the deposition of the said Robert H. Footman thereto annexed; that the said claim against the United States was never sold or disposed of by the said Robert H. Footman, assignee, by virtue of any order of the said district court; and that as well the right of action in respect of the said claim, as also all the other property and evidences of debt of the said bankrupts, is now vested in your petitioner by reason of the said order of the said district court of February 23, 1877, as assignee of the said Robert Erwin, for the benefit and interest of the creditors of him, the said Erwin.

Your petitioner adopts the averments of the said petition of the said Robert Erwin, so far as the same are pertinent to this your petitioner's petition. He further states that no assignment or transfer of said
16 claim, or of any part thereof or interest therein, has been made, except as hereinbefore stated; that your petitioner, as assignee as aforesaid, is justly entitled to the amount claimed in and by the said petition of the said Robert Erwin; that your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government; and that he believes the facts as hereinbefore stated to be true.

Your petitioner therefore prays that he may be permitted to intervene as a party petitioner and claimant in said cause, as assignee as aforesaid, and in behalf of all the creditors of the said Robert Erwin, bankrupt, as aforesaid; and that in any and every order, award, or decree hereafter to be made or passed in said cause your petitioner may be named and recognized as solely entitled to the benefit of such order, award, or decree.

L. C. RICE, [SEAL.]
Assignee.

Signed, sealed, and acknowledged before me this the 10th day of March, 1877.

[SEAL.] A. N. WILSON,
U. S. Comm'r.

17 On this fourteenth day of March, A. D. 1877, personally appeared before me Warren C. Stone, and made oath in due form of law that he is the attorney in fact of Lepine C. Rice, the petitioner named in the foregoing and annexed petition, and that he believes the facts as stated in and by the said petition are true.

WARREN C. STONE.

Sworn to and subscribed before me this 14th day of March, A. D. 1877.

[SEAL.] JOHN RANDOLPH,
Ass't Clk C't of Claims.

And now, to wit, March 26, 1877, it is ordered by the court that the motion of the assignee in bankruptcy for leave to file an intervening petition in this case be overruled.

18 VI.—*Findings of fact and conclusion of law.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I. In December, 1864, the claimant owned and was possessed of the 283 bales of cotton described in the petition. It was captured in that month by the military forces of the United States, and the proceeds thereof, paid into the Treasury, amount to $49,618 $\frac{39}{100}$.

II. On the 31st December, 1868, the firm of Erwin & Hardee, of which the claimant was a member, presented their petition in bankruptcy to the district court for the southern district of Georgia. In the schedules of the individual property of the claimant annexed to such petition there was set forth as among his assets "claim on the United States Government for 382 bales of cotton captured by General Sherman at Savannah, in December, 1864." On the 15th January, 1869,

the firm of Erwin & Hardee were adjudged bankrupts, and on the 12th January, 1870, the claimant was adjudged to be discharged as a bankrupt.

III. In March, 1872, there remained in the hands of the assignee in bankruptcy, undisposed of, a number of assets, including the claim of the claimant against the United States for the proceeds of his captured cotton. Thereupon the following proceedings were had:

"In the district court of the United States for the southern district of Georgia.

"IN THE MATTER OF ROBERT ERWIN AND Charles S. Hardee, copartners under the firm name of Erwin & Hardee, bankrupts. } In bankruptcy.

"To the honorable John Erskine, judge of the district court of the United States for said district:

"The petition of Robert H. Footman respectfully showeth unto your honor that he is the regularly appointed and qualified assignee of Erwin & Hardee, bankrupts; that as such assignee he has in his possession a great many outstanding debts and demands due or belonging to the estate of said bankrupts, which cannot be collected and received by your petitioner without inconvenient delay; wherefore your petitioner prays an order of this honorable court for leave to sell, under the direction of the register in charge of said matter, at public outcry, after giving reasonable notice thereof, by advertisement in one or more newspapers, the following notes and accounts:

"NOTES.

"Henry Schober, note for twelve thousand dollars.
"Do., " " same am't, credited by sale of steamer, $
"Glass & Whitlock, note for $3,398.96.
"M. S. Glass, " " 2,560.01.
"Do., " " 2,705.94.
"Do., " " 2,716.98.

"And any other notes uncollected.

19 "All uncollected open accounts on the books and a claim of insurance in general-average case of steamer Amizon.

"R. H. FOOTMAN,
"*Assignee.*

"Dated at Savannah, G'a, 11th March, 1872.

"Let this petition be referred to Register Beckett to take testimony on the subject-mater & report at as early a day as pract'ble—say next Tuesday in April—when the court will determine whether the prayer of the assignee ought to be granted, or how otherwise.

"March 20, 1872. "JOHN ERSKINE, *Judge.*

"SOUTHERN DISTRICT OF GEORGIA, *ss:*

"I certify that, in compliance with the order of the judge, I have examined the assignee & creditors of said bankrupt, and am of the opinion that the creditors generally desire a speedily settlement of the estate.

"I recommend that the petition of the assignee be granted, and that he be authorized to dispose of the assets of the bankrupts at public outcry, after giving notice of the time and place of sale to each creditor who has proved his debt, and by publication in one or more newspapers at least fifteen days before the sale; the sale to be made in separate lots.

"Given at Savannah this 19th April, 1872.

"ISAAC BECKETT,
"*Register.*

"Petition of assignee granted as prayed for.

"JOHN ERSKINE, *Judge.*

"May 9, '72.

"In the district court of the United States for the southern district of Georgia.

"IN THE MATTER OF ERWIN & HARDEE, BANKRUPT'. } In bankruptcy.

"SOUTHERN DISTRICT OF GEORGIA, *ss:*

"The application of R. H. Footman, assignee, of Savannah, in the county of Chatham, State Georgia, having received the approval of the honorable John Erskine, judge of said court,

"It is ordered, that said assignee have leave to sell such notes, accounts, and other debts due said estate as in his judgment will be for the interest of the creditors of said bankrupts, said sale to be made at public auction upon giving notice by mail to each creditor who has proved his claim, and by publication in one or more of the public journals of the city of Savannah, at least fifteen (15) days before the time of sale.

"Given at Savannah on the 10th day of May, 1872.

"ISAAC BECKETT,
"*Register in Bankruptcy.*"

And on the 11th May, 1872, the following entry was made by the register in bankruptcy on his official docket:

"At Savannah, May 11, 1872, ordered sale of notes and accounts at the discretion of the assignee."

20 IV. Subsequent to the proceedings and orders set forth in the third finding, it was deemed by the assignee and creditors in bankruptcy that a sale of the assets at public auction would produce little more than a nominal amount, and no such sale was made. The assets remaining unsold, the claimant, on the 22d November, 1872, made to the assignee the following offers in writing:

"SAVANNAH, *Nov'r 22d*, 1872.

"To M'r R. H. FOOTMAN,
"*Assignee for Irwin & Hardee:*

"DEAR SIR: Having been approached by several of the creditors of the late firm of Erwin & Hardee, and been solicited by them to make an offer for the assets, I submit the following, to be open for two weeks:

$2,500 for the assets exclusive of the notes of Henry Schaben, or $3,000 including these notes.

"Very truly yours,

"ROB'T ERWIN.

"SAVANNAH, *Dec. 6th*, 1872.

"The above proposition is extended until to-morrow 2 p. m.

"ROB'T ERWIN."

The assignee thereupon consulted and advised with all of the creditors of the estate except one, I. C. McBirney, who was not present, and all of them being of the opinion that the terms offered by the claimant would constitute the most beneficial sale that could be effected, the assignee accepted the said offer on the 7th December, 1872, excepting therefrom the notes of Henry Schaben, and received from the claimant the agreed sum of $2,500, and at the same time executed to him the following instrument in writing:

"SAVANNAH, *7th December*, 1872.

"Received from M'r Rob't Erwin twenty-five hundred $\frac{00}{100}$ dollars, being in full for all the remaining assets of the late firm of Erwin & Hardee, bankrupts, except the notes of Henry Schaben.

"$2,500.00. R. H. FOUTMAN, *Assignee*."

Subsequently the notes of Henry Schaben were in like manner, on the 31st March, 1873, sold to the claimant for $600, and thereafter all of the creditors, with knowledge of the facts and circumstances attending the sales, including the absent creditor, I. C. McBirney, accepted and received the final dividend of the estate derived from these sales; and the assignee's report submitted to the meeting of creditors contained the following item: "1872, December 7th. By sales of all remaining assets, except notes of Henry Schaben, twenty-five hundred dollars ($2,500)," which report was received and confirmed by the creditors, and on it the final dividend of the estate was awarded by the register.

V. The copy of the bankrupt's schedules, prepared by the register in bankruptcy for the use of the assignee, contained, as prepared, a sheet setting forth the asset or item of the claim against the United States for 382 bales of cotton, set forth in the second finding. This sheet was removed, by some person unknown, before the assignee acquired knowledge of the asset. Nor had the assignee personal knowledge that such an asset existed at the time when he sold the remaining assets of the estate to the claimant, as before found, though the existence of that asset was known to some of the creditors of the estate.

21 And at the request of the claimant the court found the following additional facts, to wit:

I. That the assignee in bankruptcy, at the time he received from the claimant the sum of twenty-five hundred dollars ($2,500) in payment of the amount agreed to be paid for the remaining and uncollected assets of the firm of Erwin & Hardee, as stated in the fourth finding, delivered and returned to the claimant "all of the books and papers representing the remaining assets of the firm of Erwin & Hardee and of the individual assets."

II. That upon the day and produce books of the said firm of Erwin & Hardee, so delivered and returned to the claimant by the said assignee,

there was entered an account of the cotton embraced in the claimant's petition, in the words and figures following, viz:

Marks.	Owners.	How received, &c.	Where stored, &c.
J P H (Fair) ..... 29 (50 24) "No mark," W. H. W., (St. middg's) ..... 74 P S⁷. ◇ ⁶⁵. Middg's.... 72 E ⁴² TD ⁹. Low middg's ..... 51 No mark. ⁵⁰ TD ⁷ Good ord'y 57 283	⅜ cotton adv't † 2. R. Erwin.	Per Gulf R. road; classed, reweighed, &c. See day-book, page 567. See the following marks and dates back: W H W..... 113 J P A..... 109 W S D..... 20 R S..... 4 R T..... 36 A B..... 1 —283	Classed and stored as follows: † 8. Jones building. (29 50 24) J. P. A. No mark. (50 7) W H W. No mark. P S = ... 160 † 6. Jones building. ◇ ..... 65 † 3. Jones building. E ⁴² TD ⁹..... 51 Demund's press (for repacking). TD 7 283

(Written across the face in red ink:)
These 283 bales, my individual property, have this day been removed by order of Gen'l "Sherman." Cotton marked "A B" by the government.
(S'g'd) ROBERT ERWIN.
Return made to the government of the within 283 bales.
(S'g'd) ROBERT ERWIN.

III. That the assignee in bankruptcy never made any comparison of the schedule of the assets of the bankrupts, as furnished him by the register in bankruptcy, with that filed in the office of the clerk of the United States district court for the southern district of Georgia, nor did the said assignee ever compare the schedule of the assets so furnished to him by the register in bankruptcy with the books of the said bankrupts which were delivered to him at the time he became the assignee of said bankrupts.

IV. That the assignee in bankruptcy did not, previous to the time he made sale to the claimant of the uncollected assets of the said bankrupts, as stated in the fourth finding, make any list or schedule of such assets, nor was any list or schedule of the assets so sold by the said assignee to the claimant delivered to the claimant at the time of such sale.

V. That, although the said assignee in bankruptcy was informed that the claimant was prosecuting the claim against the United States, stated and set forth in the petition filed herein in the year 1873 or 1874, it does not appear that either the said assignee or the creditors of the said bankrupts ever made any objection to the claimant's right to prosecute this suit in his own name and for his own benefit until subsequent to the passage by Congress of the act for the claimant's relief,
22 which became a law on the 5th day of February, A. D. 1877, and is in the words and figures following, viz:

"That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1873, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him; which claims were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

CONCLUSION OF LAW.

That the claimant is not entitled to recover, for the reasons set forth in the opinion, and that the petition be dismissed.

23 VII.—*Opinion of the court.*

DAVIS, J., delivered the opinion of the court, February 18, 1878:

The claimant was the owner, in December, 1864, of 283 bales of cotton which were captured by the military forces of the United States and sold, and whose proceeds were paid into the Treasury. In December, 1868, he was a member of the firm of Erwin & Hardee. Said firm then presented their petition in bankruptcy to the proper court in Georgia, and were in due course adjudged bankrupts. The usual assignment was made to an assignee, and the claimant was eventually discharged. He now asks this court to adjudge the restoration of the proceeds of the captured cotton in his favor personally, claiming that he alone is entitled to it.

In support of this application he contends, in the first place, that the alleged interest in the Treasury fund, which forms the subject of the present suit, did not constitute an asset at the time of the bankruptcy which could pass by an assignment made under the provisions of the bankrupt law. It is said that in January, 1869, no remedy existed by which the fund could be reached on a process begun more than two years after the suppression of the rebellion; and it is contended, on the authority of Haycraft's case (22 Wall., 81), that cotton in the enemy's country was lawful capture; that being captured and sold, and the proceeds thereof passed into the Treasury, the original owners had no property, estate, or interest in the proceeds; and that any participation in those profits, subsequently permitted by Congress, is grace and bounty, and not right.

We do not think that the opinions of the Supreme Court in the cotton cases are conflicting, as was intimated at the bar. Without citing them in detail, the general doctrine to be gathered from them on the point raised by the claimant is this. Cotton was the subject of capture because it was a leading element of the enemy's strength. The military was to seize it, but when taken it was to be turned over to civil officers, who were to sell it and transmit the proceeds to the Treasury, where it was to be set apart as a special fund. The statute which authorized the creation of the fund made provisions for proceedings against it; and indicated who might and who might not take such proceedings, and the time within which they must be taken. But the seizure and sale and transfer of the proceeds did not change the ownership of the property. As to those who were loyal, it not only did not change it, but it gave them a remedy to recover it; as to those who were not so, it did not change it, because the statute made no provision for divesting them of it by confiscation or otherwise. The learned judge who dissented from the opinion of the court in the leading case describes its effect correctly in the following words: "It maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored."

In this state of the law several parties (and among them the present claimant) whose disabilities were said to be removed by the President's proclamation of December 25, 1868, commenced suits in this court

24 after the expiration of the two years named in the statute, alleging an implied contract on the part of the United States to pay them the proceeds of their cotton. It was in answer to this new position that the Supreme Court gave the decisions which the claimant relies on. Without disturbing the principles already settled, the court added that the government has made itself an actual trustee only for such parties as it has promised to pay in case they recover judgment under the statute; that it made no promise, implied or otherwise, beyond the express promise in the act; that it authorized itself to be sued only within the period and in the manner provided in the act; and that the act is not in the nature of a statute of limitations, but is a jurisdictional statute, as are all statutes authorizing suits to be brought against a sovereign.

We see nothing in these principles inconsistent with the doctrines expounded in the cases prior to Haycraft's case. They do not affect the legal fact that the original owner of the captured cotton who can trace the proceeds of his property into the Treasury has a proprietary interest in them. Is it, however, such an interest as would pass by an assignment in bankruptcy to an assignee?

This court has already held that it is an interest which will pass by operation of law from an intestate to his administrator. (Tayloe's case, 5 C. Cl's R., 701.) By parity of reasoning, should it not pass to an assignee in bankruptcy? However, we are not left to grope in the dark, since the court of last resort has decided that a claim against a government, although incapable of being enforced in a court of law, is a right which will pass to an assignee in bankruptcy. (Comegys v. Vasse, 1 Peters, 193; Clark vs. Clark, 17 Howard, 315.) The granting words and the descriptive words of the bankrupt law of April 4, 1800, under which the assignment referred to in the case in Peters was made, are no more comprehensive than the language used in the bankruptcy act under which the claimant's property was assigned to the assignee. There is, therefore, no doubt that at the time of the assignment in bankruptcy the claimant had an interest in the proceeds of his cotton in the Treasury assignable by operation of law, and that that interest, whatever it was, passed to the assignee by the assignment.

The claimant further contends that this court should treat an assignment in bankruptcy of such an interest as the present as absolutely void under the general statutes restraining the transfer of claims against the government. Long before the passage of the present bankrupt act the Supreme Court had held that a claim against a government passes to the assignee under the general assignment in bankruptcy. If, therefore, Congress had intended to change the law in that respect, they would not have used language which had already been held to work such transfer. So far from doing this the statute expressly authorizes the assignee to prosecute in his own name actions for the recovery of debts or other things which might or ought to pass to the assignee.

The claimant next maintains that the facts found by the court show that the assignee in bankruptcy retransferred the claim in question to him for a valuable consideration prior to the commencement of this suit.

The claimant was adjudged a bankrupt as a member of a copartnership on the 15th of January, 1869. In March, 1872, the assignee of the bankrupt's estate represented to the court that there were a great many outstanding debts and demands belonging to said estate which could not be collected and received without inconvenient delay, and asked authority to sell the same at auction. A list of assets was at-

tached to the petition which purported to be a complete list, and which did not contain the claim which is the subject of this action.

It is found as a fact that the assignee had no knowledge of this claim. In a copy of the bankrupts' schedules which was prepared by the register for the use of the assignee, it was set forth at length on a separate sheet. This sheet was removed from the copy of the schedules by some unknown person, and did not come to the knowledge of the assignee; and when he sold the assets he had no personal knowledge of the existence of the claim which is the subject of this suit.

The petition for authority to sell at auction was granted, but the plan proved to be impracticable. In November and December, 1872, the claimant negotiated with the assignee for the purchase of the assets of the copartnership. The negotiation resulted in his purchasing, for an agreed consideration "all the remaining assets of the late firm." The money was paid, and the assignee returned to the claimant all the copartnership assets remaining uncollected, and as a part of the transaction delivered to him what purported to be "all of the books and papers representing the remaining assets of the firm of Erwin & Hardee, and of the individual assets." This was done with the knowledge and assent of all the creditors, to whom a final dividend was made out of the sum so paid by the claimant.

In our opinion no interest in the subject of this suit passed by that transaction. On its face the complainant bargained and paid only for the uncollected partnership assets. It did not warrant the assignee in attempting to transfer and the claimant in attempting to receive an individual asset not included in the bargain and purchase. Moreover, it is of the essence of a contract that the minds of the two contractors should come together. The claimant probably intended to buy the claim, but the assignee did not know of its existence, and therefore could not have attempted to sell it. The minds of the two parties, therefore, never came together on the subject of the alleged sale, and no sale took place.

The claimant further maintains that whatever view the court may take of the effect of the assignment in bankruptcy and of the transfer to him from the official assignee, the act of February 5, 1877, confers upon him, and upon him alone, the power to maintain this action.

That act recites in effect, though not in this exact language, that it is represented to Congress that the claimant's property was taken from him in a manner which would have entitled him to recover the proceeds of the same in the Treasury under the provisions of the abandoned and captured property act, had proceedings therefor been instituted within the time named in the act; and that without the fault or neglect of the claimant, but entirely through the accident or mistake of his agent or attorney, such proceedings were not instituted within such time. In evident consideration of such representation the act enacts that this court may take jurisdiction of the claimant's claims under the provisions of the said captured and abandoned property act of March 12, 1863.

Some of the averments in the claimant's pleadings in this suit are not quite consistent with the recitals in the act of February 5, 1877. We assume that the recitals in the act will be regarded as conclusive; but it is also to be assumed that other material facts known to this court were not known to Congress, since they are not recited in the act. Congress, therefore, neither intended to legislate upon conflicting claims to the property, nor to decide who should be entitled to the fund in the

Treasury in the event of one being found there. Such would be
26 the natural construction of the words of grant in the act, taken by themselves. Taken in connection with the recital, the conclusion is irresistible.

Hence it is to be assumed that the claimant is not entitled to recover the proceeds of the cotton in the Treasury on either of the grounds contended for by him.

The claimant's petition must be dismissed.

27 VIII.—*Final judgment.*

At a Court of Claims held at the Capitol in the city of Washington, on the 18th day of February, A. D. 1878, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said petition of the claimant, Robert Erwin, be dismissed.

28 IX.—*Application for and allowance of an appeal.*

And now on this first day of April, A. D. 1878, comes the claimant in the above-entitled cause and prays an appeal to the Supreme Court of the United States from the judgment of this court rendered in said cause on the 18th day February, 1878.

JOHN J. WEED,
Att'y for the Claimant.
ENOCH TOTTEN,
Of Counsel.

Filed April 1, 1878.

And now, to wit, April 1st, 1878, it is ordered that the appeal be allowed as prayed for.

29 In the Court of Claims.

ROBERT ERWIN
vs.
THE UNITED STATES. } No. 0855.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of the claimant for the allowance of an appeal to the Supreme Court of the United States, and of the order allowing same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this third day of June, A. D. 1878.

[SEAL.]
JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 701. Robert Erwin, appellant, vs. The United States. Court of Claims. Filed 20th June, 1878.

United States Supreme Court.

ROBERT ERWIN,
Appellant,
vs.
THE UNITED STATES.

No. 701.

Brief and Argument for the Appellant.

ENOCH TOTTEN,
Attorney for the Appellant.
JOHN J. WEED,
of Counsel.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1870.

UNITED STATES SUPREME COURT.

ROBERT ERWIN,
Appellant,
vs.
THE UNITED STATES.

No. 701.

Brief and Argument for the Appellant.

I.

Statement of the Case.

The appellant, on the 6th day of January, A. D. 1873, instituted his suit in the Court of Claims to recover the net proceeds of two hundred and eighty-three bales of upland cotton, which were taken into the possession of the United States military forces at Savannah, Georgia, in the month of February, A. D. 1865. To this petition the United States filed a plea of the general issue.

Record, pp. 2, 3.

On the 16th day of February, A. D. 1877, the appellant, by leave of the court, filed his amended petition in the said cause, and in the said amended petition the appellant stated and set forth the following facts, viz:

"1. That subsequent to the filing of the original petition herein, your petitioner proceeded to take such certain and sufficient evidence as would sufficiently establish the facts stated and set forth in such original petition; and that your petitioner did cause such evidence to be filed in said cause, and printed as required by the rules of this court."

"2. That subsequent to the filing and printing of such evidence, the Supreme Court of the United States, in the case of *Haycraft vs. The United States* (22d Wallace, 81), decided and declared that this court had not jurisdiction to hear and determine any claim or cause of action under the provisions of the act of March 12, 1863, unless such claim or cause of action had been filed or instituted in this court within *two* years from the 20th day of August, A. D. 1866."

"3. That it having been thus decided and declared that this court had not jurisdiction of the claim stated and set forth in your petitioner's original petition herein, your petitioner thereupon applied to and petitioned the Congress of the United States, to pass an act for the relief of your petitioner, and to confer upon this court authority and jurisdiction to hear and determine the several claims and causes of action which your petitioner had theretofore filed, and were pending and undetermined in this court."

"4. That the result of such application to Congress was the passage by that body of an act in the words and figures following, viz.: "

AN ACT FOR THE RELIEF OF ROBERT ERWIN.

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

"And your petitioner further states, that the said act, so as aforesaid passed by Congress, has become a law."

"5. And your petitioner further states, that Congress in passing the above entitled act for the relief of your petitioner, conferred upon this court, and intended to confer upon this court, authority and jurisdiction to hear and determine the several claims and causes of action stated and set forth in your petitioner's original petition herein, as well as those stated and set forth by your petitioner in the suit instituted by your petitioner in this court on 6th day of January, A. D. 1873, and being case No. 7914, of the causes on the general docket of this court; and your petitioner, in order that the purpose and object of Congess in passing the above-entitled act may become more apparent, attaches hereto the report of the Judiciary Committee of the honorable the House of Representatives, upon the bill for the relief of your petitioner, which had been previously referred to that committee for examination and report; and your petitioner marks the said report *Exhibit A*, and prays that the same may be taken as a part of this, your petitioner's amended petition."

"And your petitioner further states, that at the time he petitioned Congress for the passage of an act for his relief, as well as at the time of the passage of the above-entitled act, your petitioner had no other claims or causes of action against the United States, except those then pending and undetermined in this court."

On the 14th day of March, A. D. 1877, one Lepine C. Rice, claiming to be the assignee in bankruptcy of the firm of Erwin & Hardee, of the City of Savannah, in the State of Georgia (of which firm the appellant had been a member) presented to the Court of Claims his petition, praying to be allowed to intervene as a party petitioner in the suit of the said appellant then pending in that court, and for leave to prosecute the said suit as such assignee, for the use and benefit of the creditors of the said firm of Erwin & Hardee. The Court of Claims refused to allow the said assignee to intervene in the said suit or to prose-

cute the same for the use and benefit of the creditors of the said firm of Erwin & Hardee.

Record, pp. 6, 7.

Findings of Fact.

The Court of Claims, at the trial of the said cause, found and certified to this court the following statement of facts:

"This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:"

"I. In December, 1864, the claimant owned and was possessed of the 283 bales of cotton described in the petition. It was captured in that month by the military forces of the United States, and the proceeds thereof, paid into the Treasury, amount to $49,618.39."

"II. On the 31st December, 1868, the firm of Erwin & Hardee, of which the claimant was a member, presented their petition in bankruptcy to the district court for the southern district of Georgia. In the schedules of the individual property of the claimant annexed to such petition there was set forth as among his assets "claim on the United States Government for 382 bales of cotton captured by General Sherman at Savannah, in December, 1864." On the 15th January, 1869, the firm of Erwin & Hardee were adjudged bankrupts, and on the 12th January, 1870, the claimant was adjudged to be discharged as a bankrupt."

"III. In March, 1872, there remained in the hands of the assignee in bankruptcy, undisposed of, a number of assests, including the claim of the claimant against the United States for the proceeds of his captured cotton. Thereupon the following proceedings were had:"

"In the district court of the United States for the southern district of Georgia.

"In the matter of Robert Erwin and Charles S. Hardee, copartners under the firm name of Erwin & Hardee, bankrupts. } In bankrup'y.

"To the honorable John Erskine, judge of the district court of the United States for said district:

"The petition of Robert H. Footman respectfully show-

eth unto your honor that he is the regularly appointed and qualified assignee of Erwin & Hardee, bankrupts; that as such assignee he has in his possession a great many outstanding debts and demands due or belonging to the estate of said bankrupts, which cannot be collected and received by your petitioner without inconvenient delay; wherefore your petitioner prays an order of this honorable court for leave to sell, under the direction of the register in charge of said matter, at public outcry, after giving reasonable notice thereof, by advertisement in one or more newspapers, the following notes and accounts:

"NOTES.

"Henry Schaben, note for twelve thousand dollars.
"Do., " same amount, credited by sale of steamer, $.
"Glass & Whitlock, note for $3,398.96.
"M. S. Glass, " " 2,560,01.
"Do., " " 2,705.94.
"Do., " " 2,716.98.
"And any other notes uncollected.
"All uncollected open accounts on the books and a claim of insurance in general-average case of steamer Amizon.

"R. H. FOOTMAN,
"*Assignee.*

"Dated at Savannah, Ga., 11th March, 1872.

"Let this petition be referred to Register Beckett to take testimony on the subject-matter & report, at as early a day as pract'ble—say next Tuesday in April—when the court will determine whether the prayer of the assignee ought to be granted, or how otherwise.
"March 20, 1872.

"JOHN ERSKINE, *Judge.*

"SOUTHERN DISTRICT OF GEORGIA, *ss:*

"I certify that, in compliance with the order of the judge, I have examined the assignee & creditors of said bankrupt, and am of the opinion that the creditors generally desire a speedily settlement of the estate.

"I recommend that the petition of the assignee be granted and that he be authorized to dispose of the assets of the bankrupts at public outcry, after giving notice of the time and place of sale to each creditor who has proved his debt, and by publication in one or more newspapers at least fifteen days before the sale. The sale to be made in separate lots."

"Given at Savannah this 19th April, 1872.

"ISAAC BECKETT,

"*Register.*

"Petition of assignee granted as prayed for.

"JOHN ERSKINE, *Judge.*

"May 9, '72.

"In the district court of the United States for the southern district of Georgia.

"IN THE MATTER OF ERWIN & HARDEE, Bankrupt. } In Bankruptcy.

"SOUTHERN DISTRICT OF GEORGIA, *ss:*

"The application of R. H. Footman, assignee, of Savannah, in the county of Chatham, State Georgia, having received the approval of the honorable John Erskine, judge of said court,

"It is ordered, that said assignee have leave to sell such notes, accounts, and other debts due said estate, as in his judgment will be for the interest of the creditors of said bankrupts, said sale to be made at public auction upon giving notice by mail to each creditor who has proved his claim, and by publication in one or more of the public journals of the city of Savannah, at least fifteen (15) days before the time of sale.

"Given at Savannah on the 10th day of May, 1872.

"ISAAC BECKETT,

"*Register in Bankruptcy.*"

And on the 11th May, 1872, the following entry was made by the register in bankruptcy on his official docket:

"At Savannah, May 11, 1872, ordered sale of notes and accounts at the discretion of the assignee."

"IV. Subsequent to the proceedings and orders set forth in the third finding, it was deemed by the assignee and creditors in bankruptcy that a sale of the assets at public auction would produce little more than a nominal amount, and no such sale was made. The assets remaining unsold, the claimant, on the 22d November, 1872, made to the assignee the following offers in writing:"

"SAVANNAH, *Nov'r 22d*, 1872.

"To Mr. R. H. FOOTMAN,

"*Assignee for Irwin & Hardee:*

"DEAR SIR: Having been approached by several of the creditors of the late firm of Erwin & Hardee, and been solicited by them to make an offer for the assets, I submit the following, to be open for two weeks: $2,500 for the assets exclusive of the notes of Henry Schaben, or $3,000 including these notes.

"Very truly yours,

"ROBT. ERWIN.

"SAVANNAH, *Dec. 6th*, 1872.

"The above proposition is extended until to-morrow 2 p. m.

"ROBT. ERWIN."

"The assignee thereupon consulted and advised with all of the creditors of the estate, except one I. C. McBirney, who was not present, and all of them being of the opinion that the terms offered by the claimant would constitute the most beneficial sale that could be effected, the assignee accepted the said offer on the 7th December, 1872, excepting therefrom the notes of Henry Schaben, and received from the claimant the agreed sum of $2,500, and at the same time executed to him the following instrument in writing:"

"SAVANNAH, *7th December*, 1872.

"Received from Mr. Robert Erwin twenty-five hun-

to him by the register in bankruptcy with the books of the said bankrupts which were delivered to him at the time he became the assignee of said bankrupts."

"IV. That the assignee in bankruptcy did not, *previous* to the time he made sale to the claimant of the uncollected assets of the said bankrupts, as stated in the fourth finding, make any list or schedule of such assets, nor was any list or schedule of the assets so sold by the said assignee to the claimant delivered to the claimant at the time of such sale."

"V. That, although the said assignee in bankruptcy was informed that the claimant was prosecuting the claim against the United States stated and set forth in the petition filed herein *in the year* 1873 *or* 1874, it does not appear that either the said assignee or the creditors of the said bankrupts ever made any objection to the claimant's right to prosecute this suit in his own name and for his own benefit until subsequent to the passage by Congress of the act for the claimant's relief, which became a law on the 5th day of February, A. D. 1877, and is in the words and figures following, viz:"

"That the Court of Claims may take jurisdiction under the provisions of the act of March 12, 1863, entitled 'An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him; which claims were, by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said act."

Judgment of the Court of Claims.

Upon the foregoing findings of facts the Court of Claims rendered a judgment, adverse to the appellant, and ordered his petition to be dismissed.

Record, p. 12.

Assignment of Errors.

1st. The Court of Claims erred in deciding that the appellant's claim to the proceeds of the cotton, described in his petition, to which he had asserted no claim in that court, either at the time he was adjudged a bankrupt, or at the time he was discharged as such, passed to his assignee in bankruptcy, and became vested in such assignee for the benefit of the creditors of the appellant.

2d. The Court of Claims erred in holding that the appellant acquired no right to recover the proceeds of his cotton, paid into the Treasury of the United States, under the sale made by the assignee in bankruptcy, to the appellant, as stated in the *third* and *fourth* findings of fact.

3d. The Court of Claims erred in holding that although the special act of Congress, under which the appellant prosecuted his suit in the Court of Claims, was passed for his exclusive relief and benefit, yet the said act gave him no right to prosecute the said suit, nor any right to recover the proceeds of the cotton seized by the United States, and claimed by the appellant in his original petition.

4th. The Court of Claims erred in rendering a judgment against the appellant, and in favor of the United States.

II.

Points and Authorities.

FIRST. THE APPELLANT HAVING BEEN THE OWNER OF THE COTTON TAKEN FROM HIS POSSESSION AT THE TIME OF ITS SEIZURE BY THE UNITED STATES, AND AT THE TIME WHEN THE

PROCEEDS OF THE COTTON WERE PAID INTO THE TREASURY, IS ENTITLED TO RECOVER SUCH PROCEEDS IN THE SUIT BROUGHT BY HIM FOR THAT PURPOSE, IN THE COURT OF CLAIMS, UNLESS THE APPELLANT HAS TRANSFERRED HIS RIGHT TO SUCH PROCEEDS, OR HIS RIGHT THERETO HAS BEEN TRANSFERRED BY OPERATION OF LAW.

The *first* finding is conclusive upon the question of fact which this proposition presents, for the Court of Claims in *that* finding declare that the appellant was the owner of the cotton seized from his possession by the United States at the time of its seizure and sale.

The appellant did not nor could he legally transfer his right to the proceeds of the said cotton after it became a *claim* against the United States. As such, it was not assignable by the act of the appellant, unless such assignment was rendered valid by operation of law, as an incident of the assignment in bankruptcy of the appellant. Unless the right to proceed against the United States for the recovery of the money resulting from the sale of the cotton belonging to the appellant, existed at the time the appellant was adjudged a bankrupt, the assignment was not aided by that act, and the assignment was absolutely void, and conferred no right upon the appellant's assignee.

Child vs. *Trist*, 21 Wallace, R. 441;
Gillis vs. *The United States*, 95 U. S. R., 407;
Cote vs. *Same*, 3 Court of Claims, R., 64.

SECOND. ALTHOUGH THE APPELLANT WAS ON THE 31ST DAY OF DECEMBER, A. D. 1868 ADJUDGED A BANKRUPT, AND AN ASSIGNMENT OF ALL HIS PROPERTY WAS SUBSEQUENTLY MADE TO AN ASSIGNEE, AS PROVIDED IN SECTION 5044 OF THE BANKRUPTCY ACT, YET SUCH ASSIGNMENT DID NOT VEST IN SUCH ASSIGNEE ANY RIGHT TO INSTITUTE ANY PROCEEDINGS AGAINST THE UNITED STATES IN THE COURT OF CLAIMS, TO

RECOVER FROM THE UNITED STATES THE PROCEEDS OF THE COTTON WHICH IT HAD RECEIVED AS THE RESULT OF THE SALE OF THE COTTON BELONGING TO THE APPELLANT.

The correctness of this proposition is to be determined:

1st. By those provisions of the statute which declare the legal effect of an act of bankruptcy, and the rights which an assignee acquires as the legal successor or representative of the bankrupt.

2d. By an examination of the character of the supposed claim or right which the assignee acquired to the proceeds of the cotton seized from the appellant and in the possession of the United States at the time the appellant was adjudged a bankrupt.

Those provisions of the statute that are material to this inquiry are as follows:

"SEC. 5044. As soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the *estate, real and personal,* of the bankrupt, with all his *deeds, books, and papers* relating thereto, and such assignment shall relate back to the commencement of the proceedings in bankruptcy, and, by operation of law, shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached to mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

"SEC. 5046. All the property conveyed by the bankrupt in fraud of his creditors; all *rights in equity, choses in action,* patent rights, and copyrights; all *debts due him* or any person for his use, and all liens and securities therefor; and all his *rights of action* for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the *unlawful taking* or *detention,* or *injury* to the property of the bankrupt; and all his rights of redeeming such property or estate;

together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same as the bankrupt might have had if no assignment had been made shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

Revised Statutes, p. 980.

It is obvious that *at the time the appellant was adjudged a bankrupt*, he had no right to proceed against the United States in any tribunal, for the recovery of the money which had before that time been received by the United States, as the proceeds of the sale of the appellant's cotton, and paid into the national treasury.

The appellant, at that time, had no equitable right to that money, because he had neglected to assert any claim to it within the time prescribed in the statute. The right to recover the proceeds of cotton captured by the United States was never "*a right in equity*;" it was only and strictly a statutory right, *conferred upon specific terms and for a limited period.*

The claim against the United States, resulting from the seizure and sale of the cotton belonging to the appellant, did not, at the time the appellant was adjudged a bankrupt, exist as "*a chose in action*," because the United States, at that time, had both the possession and the right of possession of the money received by it as the proceeds of the sale of the appellant's cotton, and the appellant, at that time, had no right of action to recover the same or the possession thereof.

The seizure and sale of the appellant's cotton, and the payment of the proceeds thereof into the Treasury, did not *ipso facto* constitute the United States the *debtor* of the appellant, because the seizure and sale of the appellant's cotton *was authorized by both the public and statute law.* There was, therefore, no *debt* due from the United States to

the appellant, by reason of the seizure and sale of the appellant's cotton, at the time he was adjudged a bankrupt, and no "*debt*" resulting from those acts passed to the appellant's assignee in bankruptcy.

If these assumptions are correct, it follows that, at the time the appellant was adjudged a bankrupt, he had not, by reason of the seizure and sale of his cotton by the United States, any "*rights in equity*," any "*choses in action*," any "*debts due him*," nor any "*rights of action*" against the United States; and it was only these which the statute declares passed to the assignee under the appellant's assignment in bankruptcy.

It is a well-settled proposition of law, that an assignee in bankruptcy takes from the bankrupt, under the assignment, only such an estate or interest in the estate of the bankrupt as the bankrupt possessed or could enforce or assert at the time of the assignment. The assignment in bankruptcy did not restore to the assignee any rights which had been forfeited by the bankrupt. It did not create a "*debt*" or a "*right of action*" where none existed at the time of the assignment. It did not confer jurisdiction upon the Court of Claims to hear any petition which the assignee might file in that court for the recovery of the money resulting from the seizure and sale of the cotton belonging to the appellant, unless the right to institute such suit existed at the time of the assignment.

It becomes important, therefore, in view of these suggestions, to determine what rights the appellant had against the United States in consequence of the seizure and sale by the United States of the cotton belonging to the appellant, and the payment of the proceeds resulting from such sale into the Treasury, *at the time he became a bankrupt.* It is to be observed in this connection, and for the purpose of determining this question:

1st. That the cotton belonging to the appellant was the lawful subject of capture during the late rebellion.

The case of Mrs. Alexander's cotton, 2 Wall., 404, is the leading case upon this question, and in discussing it, the court used the following language:

"Being enemies' property, the cotton was liable to cap-
"ture and confication by the adverse party * * * *
"In the case before us, the capture seems to have been
"justified by the peculiar character of the property, and by
"legislation. It is well known that cotton has constituted
"the chief reliance of the rebels for means to purchase the
"munitions of war in Europe * * * *
"And the capture was justified by legislation as well as
"by public policy."

2 Wallace, R. 419, 420.

And in *Lamar* vs. *Browne et. al.*, 92 U. S. R., p. 194, this court used the following language:

"That cotton, though private property, was a legitimate subject of capture is no longer an open question in this court."

2d. That the title to the cotton, seized by the United States, vested absolutely in the United States the very instant it had been captured, and the secure possession of it had passed to the United States.

In the case of *Cote* vs. *The United States*, Court of Claims, R., 64, 67, that court, speaking upon this question, used the following language:

"By the fair interpretation of the Acts of Congress, re-
"lating to the seizure of property of supposed rebels, the

"property vested in the United States upon the capture be-
"ing complete. This is the doctrine with regard to all
"property lawfully taken in war, whether taken upon the
"land or sea."

"The title of the owner, so soon as the captor has gained
"a firm possession, is considered as divested; and this,
"usually, is considered as occurring after twenty-four hours'
"undisturbed possession by the captor, or after the booty
"has been carried into a place of safety, *infra praesidia*."

And in the same opinion that court also said:

"So it will be seen, on recurring to the various acts of
"Congress for seizing and confiscating the property of
"rebels, that the property vested unconditionally and ir-
"revocably in the United States after the passage of the
"act of March 12, 1863."

In *Haycraft's case*, 22 Wall., 98, this court declared that the seizure of cotton by the United States, under the provisions of the "Abandoned and Captured Property Act," involved "no question of confiscation;" and that "the title of the United States, whatever may be the rights it carries with it, is by authorized capture or appropriation of enemies' property on land."

In the case of *Lamar* vs. *Browne et al.*, 92 U. S., R., 195, this Court, discussing the same question, used the following language:

"Property captured at sea can never be converted by the captor until it has been brought to legal adjudication; and it is his duty, with all practicable despatch, to bring his prize into some convenient port for that purpose. *Not so with regard to movable property on land. There the* CAPTURE *changes the ownership without adjudication, unless restrained by governmental regulations.*"

These principles are but a repetition of the well established rules of the law of nations.

Grotius' Lib. III, chap. 6, sec. 3; chap. 9, sec. 14;
Halleck's International Law, 451;
Wheaton's Law of Nations, pp. 432, 433, 434.

3d. It being clear that the right to the proceeds resulting from the capture and sale of cotton during the late rebellion vested in the United States, the material inquiry, therefore, is, as to what was granted, what right conferred upon the person from whom the cotton was captured under the "Abandoned or Captured Property Act." The passage of that act was an act of grace and bounty on the part of Congress. Its purpose was to give back to those who had remained loyal to the Government during the rebellion, *so much of the money of the United States as had been derived from the seizure and sale of the property of such loyal persons.* There was no legal obligation resting upon the United States to restore to any one any part of the money which the United States had thus derived. The seizure and sale of such property, and the payment of the proceeds into the national treasury, created neither an *express* nor an *implied obligation* upon the United States to restore such proceeds.

Mr. Justice STORY, in the case of "The EMULOUS, 1 Gall., 569, says:

"It is now clear that all captures in war inure to the sovereign, and can become private property only by his grant."

And that eminent admiralty judge, Sir William Scott, in the case of the "ELSEBE," 5 Rob., 173, speaking upon that question, used the following forcible language:

"No man has, or can have, any interest (referring to an interest in a capture made *jure belli*), but what he takes as the mere *gift* of the crown. Beyond the extent of the *gift*

he has nothing. This is the principle of war on the subject and founded on the wisest reasons. The right of making war and peace is exclusively in the crown. The acquisitions of war belong to the crown; and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace."

The act of March 12th, 1863, created both the right and remedy for its enforcement.

This Court, in the case of *Klein* vs. *The United States*, 13 Wall., 138, truly say, "that there is no similar legislation mentioned in history." And the court might also have declared that there is no case to be found anywhere, in which a capture, lawfully made *jure belli*, has been made the basis of a legal demand or right by an *enemy* of the nation making the capture.

If the appellant had any right to recover the proceeds of his cotton, either upon an express or an implied contract, independently of that statute, he could have enforced it under the provisions of the act of Congress for the re-organization of the Court of Claims, approved March 3d, 1863.

4th. But the right and the remedy conferred by the "Abandoned or Captured Property Act," was absolutely lost and forfeited to both those who were loyal and those who were *pardoned*, unless suit was instituted to enforce the right within two years from the 20th day of August, 1866.

United States vs. *Anderson*, 9 Wall., 56, 71;
Mrs. Alexander's cotton, 2 Wall., 422;
United States vs. *Klein*, 13 Wall., 142;
Ex parte Zellner, 9 Wall., 248;
Haycraft vs. *The United States*, 22 Wall., 94;
Lamar vs. *Browne et al.*, 92 U. S., R., 198;
Chamberlain vs. *Stanton*, 2 Wood, 164, 166.

These authorities all speak with one voice and the same authority, and each of them declares that the failure of any person, entitled to the benefits of the "Abandoned or Captured Property Act," to assert his rights *within the time prescribed in that act, forfeits both the right and the remedy.*

In the case of Haycraft, above cited, this Court used the following language:

"But the same statute which authorized the capture, gave "a right to certain persons to demand and receive a res- "toration of their property taken. Coupled with the right "to demand, was a provision for the remedy by which it "was to be enforced."

22 Wallace, 98.

And in the same case the Court also declare:

"But the commencement of the suit within *the prescribed* "*time, was a condition precedent* to the ultimate relief. *The* "*right of recovery was made to depend upon the employment* "*of the remedy provided by the act.*"

"There was no promise except to such as should com- "mence the suit in time, and upon the trial be in a con- "dition to bring themselves within the requirements of the "act."

22 Wallace, 95, 96.

Again in the same case, this Court used the following language:

"In the indiscriminate seizure which was likely to follow such an authority (referring to the authority to capture cotton, as provided in the act of March 12, 1863), it was anticipated that friends as well as foes might suffer. Therefore, to save *friends*, it was provided that any person claiming to have been the owner, might, at any time "*within two years after the suppression of the rebellion*," prefer his claim, and, upon proof of his ownership and loyalty, receive the money realized by the United States from the sale of his property. *That expresses all there is of the trust or the remedy provided.*"

22 Wallace, 94.

In the case of *The United States* vs. *Gillis*, 95 U. S., R., 417, this Court also said that:

"*Not every person is permitted to sue for such proceeds.* The act declares that any person claiming to have been the owner of any such abandoned or captured property, may, at any time *within two years after the suppression of the rebellion* prefer his claim to the proceeds thereof in the Court of Claims, and, on proof to the satisfaction of the Court of his ownership of said property, &c., receive the residue of such proceeds. It is thus plain that only he who can claim as an owner of the property captured or abandoned, *and can prove such ownership, is permitted to sue and recover. The assignee of a claim for the proceeds is not such an owner of the property captured. That the ownership claimed and* REQUIRED *to be proved is that which existed at the time of the capture, is quite plain.*"

Carroll vs. *The U. S.*, 13 Wall., 156.

The United States, in respect to the fund resulting from the seizure and sale of abandoned or captured property, did not constitute itself a "*trustee*" for any persons, except such as remained loyal to the United States.

United States vs. *Anderson*, 9 Wall., 65;
United States vs. *Klein*, 13 Wall., 138, 139.

Congress never intended that the benefits of that act should be secured to any person or persons, except such as were expressly mentioned in its provisions. It has never yet expressly conferred jurisdiction, by a general law, upon the Court of Claims, to hear and determine the claim of those who were *disloyal.*

5th. The *true test* by which the appellant's right to recover from the United States the proceeds of the cotton which the United States took from his possession and sold, is to be determined by ascertaining what would have been his right in respect to that property had the "Abandoned or Captured Property Act" never been passed.

The Court of Claims answered this question in the case of *Alexander L. P. Green* vs. *The United States*, 10 Court Claims, R., 466, in the following language:

"This case presents, with unusual clearness, the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion, other than the liability created by the *Abandoned or Captured Property Act.*

"It may be conceded that the Government is liable, upon express contracts, to persons residing within the insurrectionary districts. Where the officers or agents of the Government entered into an agreement with a person who, for the time, at least, wore the garb of a public enemy, and the Government reaped a positive benefit from the contract, while the contractor made a positive sacrifice on the faith of it; where, in short, there has been gain on the one side and loss on the other, and the gain has been acquired and the loss suffered on the faith of the agreement, such a contract has always been upheld. If the officers of the Quartermaster's Department during the war with Mexico had entered into contracts in due form, and pursuant to their legal authority, there is no reason for saying that those contracts would not be binding upon the Government. In other words, there is no reason for saying that the Government is debarred from acquiring supplies by contract from the inhabitants of an enemy's country. A different doctrine would be mischievous, injurious to the Government, and abhorent to the liberal spirit which pervades modern international law.

"But the case before us presents no such question. It, in effect, goes upon a supposed liability of the Government under these conditions, viz: for the acts of its officers, *done under color of its authority*, within the insurrectionary districts where the party injured was loyal, and the circumstances were such as would give to a citizen in time of peace a right of action against the Government, under the mandate of the Constitution, that private property shall not be taken for public use without just compensation. *Our conclusion is that no such liability exists, and that no such action can be maintained.*"

And this Court, in discussing a somewhat similar question in "the *Elgee Cotton Cases*," 22 Wall., 185, 186, used the following language:

"It is the owner alone who has any standing in the Court " of Claims under the Captured and Abandoned Property " Act. In regard to such property, only such suits can be " brought as are authorized by the statute. That statute " furnishes a complete system for the prosecution of claims " under it, and defines the extent of the rights which those " who claim an interest in the proceeds of property cap- " tured or abandoned during the civil war may assert " against the Government.

"*According to the well-known rules of statutory construc-* " *tion, the system is exclusive of all others, and the rights de-* " *fined are the only ones which can be enforced in any judicial* " *proceeding.* The language of the act makes it plain that " no one is allowed to sue in the Court of Claims, for the " proceeds of captured or abandoned property, unless he " can prove, to the satisfaction of the court, three things: " *first*, his ownership of the property seized; *secondly*, his " right to the proceeds of the property; *thirdly*, that he " never gave aid or comfort to the rebellion."

These authorities are conclusive of the question as to any rights the appellant would have had against the United States, *in any tribunal*, in respect to the seizure of his cotton, but for the passage by Congress of the "Abandoned and Captured Property Act." That act was ineffectual to afford the appellant any relief until its provisions were revived by the special act passed by Congress for the appellant's relief on the 5th day of February, 1877. That special act cannot have a retroactive effect so as to restore to, and confer upon, the appellant's assignee in bankruptcy, rights which had been forfeited by the appellant at the time he became a bankrupt. It must necessarily result, therefore, in any and every view of this case, that on the 31st day of December, 1868, the date when the petition of the firm was filed in the bankruptcy court, the appellant's right to bring suit against the United States for the proceeds of his cotton, had been wholly lost and forfeited by his neglect and failure to institute his suit therefor within the time prescribed by the statute. He had at that time

neither any claim or demand against the United States, resulting from the seizure and sale of his cotton, nor any right of action against the United States for the proceeds derived from the sale of such cotton, which he could enforce either in this court or elsewhere. The assignment in bankruptcy made by the appellant did not restore to his assignee any right or rights of action which the appellant had *forfeited* or lost previous to the time he was adjudged a bankrupt. The assignee took only such rights and interests as the bankrupt was entitled to enforce at the time of the assignment.

Kittridge vs. *McLaughlin*, 33 Maine, 327;
Mitford vs. *Mitford*, 9 Vesey, 86, 99;
In re Hambright, 2 Bankruptcy Reg., 489;
Winsor vs. *Kendall*, 3 Story, 507;
Fikes vs. *Hunt*, 2 Story, 582;
Rhodes vs. *Blackiston*, 106 Mass., 334;
Blin vs. *Pierce*, 20 Vt., 25;
Ontario Bank vs. *Mumford*, 2 Barb., ch. 596;
Nichols' Assignee vs. *Eaton*, 91 U. S., R., 720.

6th. The Court of Claims, in its *opinion* in this case, assumed that the cases of *Comegys* vs. *Vasse*, 1 Peters, 193, and *Clark* vs. *Clark*, 17 Howard, 315, are authorities by which to sustain the assumption of the court, that although the appellant had no right or interest in the proceeds of the cotton which the United States had seized and sold, nor any right to maintain any suit therefor, nor any legal or equitable interest therein, yet that such an interest in the proceeds of the said cotton passed to the appellant's assignee in bankruptcy, as will enable the said assignee to maintain an action for such proceeds, under the provisions of the act passed for the appellant's relief. That is the *logic* of the opinion of the Court of Claims, if not its *language*.

It is appropriate, therefore, to examine the cases upon which that court based its assumption.

The case of *Comegys* vs. *Vasse*, was this:

Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States which were captured and carried into the ports of Spain, and abandonments were made thereof to Vasse by the owners, and he paid the losses arising therefrom *prior to the year* 1802. Vasse became a bankrupt, and was discharged from liability, on account of his debts, on the 28th day of May, 1802. In the year 1824, the sum of $8,846.14 was received by Vasse's assignee in bankruptcy from the Treasury of the United States, being the sum awarded by the commissioners under the treaty concluded between the United States and Spain, dated February 22d, 1819, "*on account of the capture and losses aforesaid.*" Vasse brought suit in the circuit for the district of Pennsylvania, against his assignees in bankruptcy, to recover the said sum of money which Spain had paid over to the United States under the provisions of the said treaty. Vasse recovered a judgment in the Circuit Court, from which his assignees in bankruptcy appealed to this court. In this court *three* questions were decided:

1st. That the decisions of the commissioners, under the treaty upon claims presented to them, were final and conclusive.

2d. That the claims of the owners of the vessels and cargoes, *illegally captured* and condemned by the Spanish authorities, passed to Vasse, the underwriter, by virtue of the abandonment of such vessels and cargoes, and the payment of the insurance thereon by him. And in deciding this point, the Court used the following language:

"We consider it then clear, upon authority, that the right to the compensation in this case was in its nature assignable, and passed by abandonment to Vasse. The right to indemnity for an *unjust capture*, whether against the captors or sovereign, whether remediable in his own courts or

by his own extraordinary interposition and grants upon private petition or upon public negotiation, is *a right attached to the ownership of the property itself*, and passed by cession to the ultimate sufferer. "If so assignable to "Vasse, it was equally, *in its own nature*, capable of assign- "ment to others."

And in the same case, referring to the decision of the court in the case of *Campbell* vs. *Mullet*, 2 Swanston, 551, and quoting its language, the learned Judge, Mr. Justice STORY, said:

"Such is the language of the learned judge, and we cannot say that the reasoning is at all satisfactory. It is not universally thought it may ordinarily be one test of right that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the King of Great Britain nor the Government of the United States is suable, in the ordinary courts of justice, for *debts* due by either. Yet, who will doubt that such *debts* are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claims upon principles of public law to remuneration. With reference to mere municipal law he may be without remedy; but, with reference to the principles of international law, *he has a right both to the justice of his own* and the foreign sovereign. The theory, too, that an indemnification for *unjust captures* is to be deemed, if not a mere donation, as in the nature of a donation, *as contrasted with right*, is not admissable. * * * The very ground of the treaty is that the municipal remedy is inadequate, *and that the party has a right to compensation for illegal captures* by an appeal to the justice of the government. It was *never* understood that the case was one to which the doctrine of donation applied. The *right to compensation*, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property in a municipal court of justice.

"The case of *Randall* vs. *Cochran*, 1 Ves., 98, stands upon the true ground. It considers *the right of indemnity as traveling with the right of property.*"

3d. That the money awarded to the assignees of Vasse,

by the commissioners under the treaty, passed to them under the assignment in bankruptcy made by Vasse. Discussing this question, the Court say:

"We may now come to the point which, indeed, is the only one of any intrinsic difficulty in the cause, whether the *right so vested in Vasse* to compensation, passed under the bankruptcy assignment, to his assignees. That this is a question free of doubt will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the court below. *The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of* 1800, *chap.* 19.

"The act begins by an enumeration of the persons, who are liable to be declared bankrupts, and among them are 'underwriters or marine insurers.' This plainly shows the sense of the legislature that such persons might, by the ordinary course of their business, be reduced to insolvency, and be justly placed within the beneficial operations of such a law. *As the legislature meant to exonerate the underwriter from all future liability for his debts, it would seem rational that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees for the benefit of his creditors.*"

1 Peters, pp. 218, 219.

The decision of the court in this case, upon the last point, is placed upon the express ground that, at the time of his becoming a bankrupt, the claim under consideration, and all the rights growing out of the same, or incident thereto, were "*completely vested in right and interest in Vasse*," and "that the rights devolved upon Vasse by the abandonment, would, in case of his death, have passed to his personal representatives; and, when the money was received, be distributable as assets."

Let us, for a moment, contrast the case at bar with the case above cited. That was a case of *vested rights* growing out of an *illegal capture*. This is a case where there was no right, because the capture was authorized and lawful. In that case the right could never be lost by any statute of

limitations, because, as to wrongs committed by one nation upon the citizens of another, there is never any limitation of time as to when the nation, whose citizen has received an injury, may demand reparation or indemnity for such injury. In this case, both the right and the remedy were only and strictly statutory, and a failure to pursue the statutory remedy forfeited not only the remedy but the right which it conferred. All that was left to the appellant, when such a forfeiture had become complete, was the right to petition Congress for the exercise of its grace and bounty, and the restoration of that which the appellant had no legal or equitable right to demand. This right of petition is given to every citizen of the United States by the Constitution, and is the only right which would have passed to and become vested in the appellant's heirs or administrators had he died before his bankruptcy. Surely such a right is too shadowy and uncertain to be such an asset as would vest in an assignee under an assignment in bankruptcy. It is less than *expectancy*, which an heir may reasonably hope for on the death of his ancestor.

The case of *Clark* vs. *Clark*, 17 Howard, 315, was this: Clark, the appellant, applied for the benefit of the bankrupt act in January, 1843; both previous and subsequent to this time he urged a claim against the Government of Mexico *for the illegal seizure of the cargo of the schooner Louisiana.* The commissioners under the treaty between the United States and Mexico, concluded February 2d, 1848, awarded him the sum of $86,786.29, as indemnity, which the Mexican Government should pay to him, in consequence of the *unlawful seizure* of the cargo of the said schooner. In his schedule of property, he had concealed the existence of the claim which he had, previous to his bankruptcy, presented against the Republic of Mexico for the *illegal seizure* of his property. Clark bought in all his assets at a sale made by the assignee in bankruptcy, under

an order of the court, for the sum of *two dollars*, and under this sale he claimed to be the *bona fide* owner of all the property and rights of property which he had given in or indicated on his schedule. The only question which the case presented was, whether the sale so made, and the title to the rights of property so acquired by Clark, was valid. This court held that the sale to him was fraudulent and void. *That* was all this court decided. That the claim which Clark had against the Government of Mexico was "*a right of property*" and as such passed to his assignee in bankruptcy, cannot be doubted, so long as the sound principles of the case of *Comegys* vs. *Vasse* are accepted as unquestioned law.

We refer the court also to the case of *Milnor et al.* vs. *Metz*, 16 Peters, 221.

In that case Milnor was discharged by the insolvent laws of Pennsylvania, after having made, according to the requirements of the law, an assignment of "*all his estate, property, and effects, for the benefit of his creditors.*" After his discharge, he presented a petition to Congress for compensation for extra services performed by him as United States guager, *previous to his petition for discharge under the insolvent law.* Congress passed an act appropriating the sum of two thousand seven hundred and fifty-seven dollars and twenty-three cents, being the amount equitably due for such extra service. The assignee, under the insolvent laws, claimed the right to receive this money from the treasury, and the Court held that he was entitled to receive it.

The Court, in that case, used the following language:

"The services performed by Milnor were at the instance of the Government, and necessary to execute the act of 1836." The equity of the claim was free from doubt."

"Had a similar claim, on the part of Milnor, existed "against an individual, instead of the government, then "there can be no doubt he could have recovered it by suit,

" or it would have been the subject of set-off, or could have " been assigned. So it would have passed to his adminis- " trator in case of death."

The case of *United States* vs. *Hunter*, 5 Mason, 62, following the case of Comegys *vs.* Vasse, decides the following propositions:

1. That the claim of a person to compensation for wrongs done under Spanish authority, and provided for by the treaty of 22d of February, 1819, with Spain, passed to the general assignee of such person upon his insolvency.

2. That if under the act of Congress, approved May 24, 1824, (ch. 14, sec. 2,) the Secretary of the Treasury omit to retain the amounts of debts due to the United States from a person entitled, by an award under the said treaty, to money provided for payment of such award, it does not prejudice the right of the United States to proceed for the payment of such debts against the general assignee, who has received the money paid on such award, and in satisfaction thereof from the Treasury of the United States.

These are all the cases by which the assumptions of the Court of Claims can be maintained.

We need not dispute the correctness or soundness of either of them. Each of them shows an existing right or debt due at the time the debtor became a bankrupt.

The case at bar shows the existence of neither of these facts. These cases, therefore, are not authorities by which the decision of the Court of Claims upon this branch of the case can be maintained.

THIRD. EVEN IF THE PROPOSITION, THAT THE APPELLANT'S ASSIGNEE IN BANKRUPTCY BECAME ENTITLED TO THE PROCEEDS RESULTING FROM THE SEIZURE AND SALE OF THE APPELLANT'S COTTON BY VIRTURE OF THE APPELLANT'S ASSIGNMENT, CAN BE SUSTAINED, STILL THE APPELLANT'S RIGHT TO RE-

COVER SUCH PROCEEDS FROM THE UNITED STATES IN THIS SUIT, WAS RESTORED BY VIRTUE OF THE SALE OF THE UNCOLLECTED ASSETS OF THE FIRM OF ERWIN & HARDEE, AS STATED BY THE COURT IN THE THIRD AND FOURTH FINDINGS OF FACT.

It will be useful in discussing this proposition, to state certain facts about which there is neither question or controversy.

1st. The claim against the United States, which the appellant *supposed he had* at the time he became a bankrupt, was returned to the register in bankruptcy by the appellant, in his schedule of individual assets, in the following words: "*Claim on the United States Government for* 382 *bales of cotton captured by General Sherman, at Savannah, in* 1864." And in the day and produce book of the firm of Erwin & Hardee, there was an account of the cotton claimed in the appellant's original petition, showing it to be the individual property of appellant, and stating the fact of its seizure by order of General Sherman.

Record, pp. 7, 11.

2d. That the appellant was discharged from bankruptcy on the 12th day of January, A. D. 1870.

Record, p. 8.

3d. That on the 11th day of March, 1872, there remained in the hands of the assignee, undisposed of, a number of assets, including the claim of the appellant against the United States for the proceeds of his captured cotton; and thereupon the said assignee petitioned the court for leave to sell such assets which could not be collected without inconvenient delay, but did not specially describe in his petition the above-mentioned claim of the appellant against the United States. Thereupon the register examined both the assignee and creditors, and found that the creditors generally desired a speedy settlement of the estate.

Record, p. 8.

4th. On the 10th day of May, 1872, the judge of the bankruptcy court having *previously* granted the prayer of the assignee's petition, the register in bankruptcy directed a sale of the assets, described in the petition, to be made by the assignee, upon giving notice by mail to each creditor of the time and place of such sale, and by publication thereof at least fifteen days before the time of sale; and on the 11th day of May, 1872, the said register in bankruptcy, "in the matter of Erwin & Hardee, bankrupts," made the following entry in his official docket: "*At Savannah, May* 11, 1872, *ordered sale of notes and accounts at the discretion of the assignee.*"

Record, p. 9.

5th. That no disposal of such assets at public sale was made, because *the assignee and the creditors* believed that the assets, if sold in that way, would produce little more than a nominal amount; and the appellant, on the 22d day of November, 1872, having been previously solicited by some of the creditors to make an offer for the assets, did, on that day, offer the sum of $2,500 for all of the assets of the firm of Erwin & Hardee, except certain notes therein specified.

Record, pp. 9, 10.

6th. That on the 7th day of December, 1872, the said assignee, having previously consulted with all the creditors except one, and *all of them* being of the opinion that the terms offered would be most beneficial to the creditors of the said bankrupts, the assignee accepted the said offer, and the appellant on that day paid the said sum of money to the assignee, who at that time gave to the appellant a receipt for the said sum of money, in which it was specified that the payment thereof was "*in full for all the remaining assets of the late firm of Erwin & Hardee, bankrupts, except the notes of Henry Schaben.*"

Record, p. 10

7th. Subsequent to the making of the sale of the said assets, and the payment of the said sum of money therefor, *all of the creditors of the said bankrupts*, with full knowledge of all the facts and circumstances attending the said sale, received and accepted the final dividend of the estate derived from the said sale; and the assignee's report submitted to a meeting of the creditors contained the following item: "1872, *December 7th. By sales of all remaining assets except notes of Henry Schaben, twenty-five hundred dollars* ($2,500);" and this report was received and confirmed by the creditors, and on it the final dividend of the estate was awarded by the register.

Record, p. 10.

8th. That the assignee in bankruptcy never made any comparison of the schedule of the assets of the said bankrupts, with their books of account, nor did the said assignee ever make any list of the uncollectable assets of the said bankrupts, nor furnish the appellant with any list of the assets of the said bankrupts, sold by the said assignee to the appellant. It is appropriate here to remark that the Court below, in its *opinion*, says that a list of assets was made which "purported to be a complete list." This assumption is entirely unfounded, and the facts found by that court, in the *fourth additional finding*, prove the contrary to be the case.

Record, p. 11.

9th. That although the assignee of the said bankrupts was informed that the appellant was prosecuting his suit for the proceeds of his cotton, seized and sold by the United States, in the Court of Claims, three or four years previous to the date of the passage by Congress of the act for the relief of appellant, yet neither the said assignee nor any of the creditors of the said bankrupt ever, at any time, made any objection to the appellant prosecuting

the said suit in his own name, and for his exclusive benefit, until subsequent to the date of the passage by Congress of the act for the relief of the appellant.

From the foregoing facts it is clear that the following legal propositions may be maintained:

A. That an assignee in bankruptcy, being only the agent of the creditors of the bankrupt, is subject to their direction; and any acts done by such assignee, by the direction or with the assent of the creditors of the bankrupt, is binding and conclusive, not only upon the creditors of the bankrupts, but also upon the assignee, unless the act done was injurious to, or in fraud of, the rights of either the creditors or the bankrupt. The court in bankruptcy protects a bankrupt estate: 1st. For the benefit of the creditors; 2d. For the benefit of the bankrupt after his debts are satisfied and discharged.

The right to select an assignee belongs exclusively to the creditors, and neither the register or the court in bankruptcy have a right to interfere in his selection.

In re Smith, 2 Ben., 113.

B. The register in bankruptcy, *by direction of the creditors* of the bankrupts, had authority to direct the assignee to sell the uncollected and uncollectable assets of the bankrupts in such manner as would prove most beneficial to the creditors.

A register in bankruptcy in regard to the ordinary matters relating to the administration of a bankrupt estate, possesses all the powers of the district judge, sitting as a court of bankruptcy. And as the court would have ordered a sale of the uncollectable assets of the bankrupts in such a manner as the creditors should consider most beneficial to themselves, so it may be assumed that the register, in changing the manner of making the sale of such assets, was only carrying out the wishes of the credit-

ors, who may well be presumed to have fully understood the manner in which the uncollectable assets of the estate could be made most productive.

C. Such a sale made with the consent of, and for the benefit of, those who were alone interested in its results, and who had the exclusive right to object to its terms, will be sustained, although not made strictly in accordance with the requirements of the statute or the orders of the court; and such a sale would only be set aside by the court upon the ground that fraud, wrong, or injustice to those interested in the subject of the sale, had resulted from making such sale, upon private negotiations between the creditors and the purchaser, rather than at public out-cry by the assignee in bankruptcy.

Alderman vs. *Chester*, 34 Ga., 152;
Hatcher vs. *Cade*, 55 Ga., 359;

And confirmation of an irregular judicial sale will be presumed *from the lapse of time*, and the possession of the thing purchased; and also by acquiescence of the parties, amounting to a recognition of the sales as valid.

Rorer on Judicial Sales, p. 11, Sec. 13;
Tipton vs. *Powell*, 2 Coldwell, 19.

So, also, the ratification of an illegal or irregular judicial sale will be presumed by the receipt of the purchase money, with a full knowledge of all the facts and circumstances attending the sale.

Rorer on Judicial Sales, p. 7, Sec. 169;
Michoud vs. *Girod*, 4 Howard, 503.

Applications for setting aside judicial sales for merely *voidable* causes must be made in reasonable time, and before distribution of the proceeds.

Bullard vs. *Green*, 10 Mich., 268;
Goodwin vs. *Burns*, *Ibid*, 211;
Stiver's Appeal, 56 Penna. St., 9.

There has been no application to set aside the sale under which the appellant became entitled to receive the uncollectable assets of the estate of Erwin & Hardee. Neither the creditors or the assignee of the said bankrupts have ever denied the validity of that sale; and for more than five years they have each and all acquiesced in it, and retained the proceeds which resulted from making such sale. It is too late now for them to deny its validity, or to dispute its binding force.

D. That the sale of the uncollected and uncollectable assets of the firm of Erwin & Hardee, by their assignee in bankruptcy, to the appellant, was a sale to him of *personal property;* and at the time of such sale, the appellant received from the assignee all the "books and papers representing the remaining assets of the firm of Erwin & Hardee, *and of the individual assets;* and the possession of such property, under the statutes of the State of Georgia, gives a perfect and complete title by prescription; and such a title is absolute in the possessor of such property, and may be enforced in the courts of any State where a controversy in respect to such title arises.

Code of Georgia, Sec. 2685;
Paschal vs. *Davis*, 3 Kelly, 265;
Wynn vs. *Lee*, 5 Ga., 217;
Pendergast vs. *Foley*, 8 Ga., 7;
Worthy vs. *Johnston*, 10 Ga., 361;
Shelby vs. *Guy*, 11 Wheaton, 361;
Brent vs. *Chapman*, 5 Cranch, 358.

E. That the assignee of the said bankrupts, as well as their creditors, having for more than four years, previous to the passage by Congress for the relief of the appellant, asquiesced in the sale of the assets of the said bankrupts by the assignee to the appellant, are *estopped* from calling in question the validity of the said sale, and cannot be heard

now to deny or impeach the right of the appellant to receive the benefits resulting from such sale.

Bigelow on Estoppel, pp. 500, 501;
Twin Lick Oil Co. vs. *Marbury*, 19 Wall., 587;
Mumford vs. *Bliss*, 12 B. Monroe, 255;
Walker vs. *Mulvean*, 76 Ill., 18;
Davidson vs. *Young*, 38 Ill., 145, 146;
Corwin vs. *Shoup*, 76 Ill., 246.

And this principle holds good irrespective of the nature of the property sold.

Bird vs. *Benton*, 2 Devereaux, 79;
Govern vs. *Freeman*, *Ibid*, 472;
Grace vs. *Mercer*, 10 B. Monroe, 261.

And nothing is better settled than the principle "that the express or even tacit acquiescence of the owner in an unauthorized sale of chattels personal, will preclude him from questioning the title of the vendee."

Cox vs. *Buck*, 3 Strobert, 367;
Thompson vs. *Blanchard*, 4 Comstock, 303;
2 Smith's Leading Cases (1855), 660.

The creditors and the assignee are alike *estopped* from denying the title of the appellant acquired under this sale. No one else has a right to speak save the United States; and the United States, with all the facts before the legislative department, has, by the bill for the appellant's relief, given its assent to the recovery of the proceeds of the appellant's cotton *by the appellant.*

F. It is an equally well-established principle of law, that neither the assignee in bankruptcy nor the creditors of the said bankrupts can be heard to impeach the validity of the said sale, without having first paid or tendered back to the appellant the money paid by him as the consideration

for the said sale which they received and divided amongst themselves.

Tisdale vs. *Buckmore*, 33 Maine, 461;
Jennings vs. *Gage*, 13 Ill., 610;
Coke vs. *Rucks*, 34 Miss., 105;
Utter vs. *Stewart*, 30 Barbour, 20.

G. It was not the fault of the appellant that the assignee in bankruptcy had not acquired knowledge of the assets which the bankrupts had assigned to him. There was neither concealment nor an attempt at concealment of the existence of the supposed claim against the United States, for the appellant, at the time of his assignment, inserted it in his schedule of individual assets, and a statement of the fact of the seizure of the cotton, out of which the claim arose, was to be found upon the day and produce books of the bankrupts. The assignee in bankruptcy, therefore, was guilty of such laches, in the discharge of his duties as assignee, as to preclude him from repudiating a sale made in ignorance of facts which resulted from such laches.

Rorer on Judicial Sales, pp. 239, 240, Sec. 569.

But the creditors and the assignee alike had the means of knowing what constituted the uncollectable assets of the firm of Erwin & Hardee, and the assets of the individual members thereof. The schedule, in the hands of the register, contained a statement of this claim; and the day and produce books contained such information as would have enabled them to determine its character and value. If they neglected to avail themselves of the knowledge and information thus accessible to them, they, and not the appellant, must suffer the consequences of that neglect.

Slaughter's Administrator vs. *Gerson*, 13 Wall., 379;
Blease vs. *Garlington*, 92 U. S., R., pp. 8, 9;
Smith vs. *Richards*, 13 Peters, 37.

H. The facts found by the Court are inconsistent with its legal conclusion, that the minds of the contracting parties (the assignee in bankruptcy and the appellant) had never come together or assented to that which was the subject of the contract or to its terms. The Court say that, "the claimant probably intended to buy the claim;" but the assignee could not have intended to sell it, because he did not know of its existence; and yet the Court expressly find, as a fact, that the assignee, at the time he received payment of the purchase money for all the remaining assets of Erwin & Hardee, delivered to the appellant "all of the books and papers representing the remaining assets of the firm of Erwin & Hardee, *and of the individual assets.*" If the assignee did not intend to sell to the appellant the *individual assets*, why deliver to him the papers relating to such assets?

It is to be remembered, also, that the Court find as a fact in the fourth finding, requested by the appellant, that the assignee did not, either *before* he made the sale to the appellant, or at the time he made such sale, make any schedule or list of the assets sold or to be sold. He described them as "all the remaining assets of the firm of Erwin & Hardee." Can it be safely said that in this description the assignee intented to describe only the assets of the "firm," since he delivered to the appellant at the time of the sale all the books and papers relating to the "*individual assets*" of the designated firm?

Again, it is to be borne in mind that the firm of Erwin & Hardee was dissolved by their bankruptcy, and the *estate* which resulted from that bankruptcy was composed of the assets of the firm as well as the assets of each individual member thereof; and the Court of Claims, in its *opinion*, seeks to establish the proposition that there were firm assets and individual assets, each in a seperate and distinct estate, and kept each from the other, for the Court ex-

pressly declare that the claim in controversy was not re-transferred to the appellant, because "*on its face the complainant bargained and paid only for the uncollected patnership assets.*" This proposition cannot be maintained. In the petition of the assignee for leave to make the said sale, he speaks of the "many outstanding debts and *demands* due the estate of the bankrupts."

Now it is clear that there can be but *one estate* in a bankruptcy proceeding arising out of a partnership, and all the partners necessarily become bankrupts; the individual estate of each partner belongs to the assets in the hands of the assignee and vest in him in the same manner as the partnership property. If there could be *two* separate estates in the hands of the assignee, one composed of individual property, and the other of partnership property, there might be some force in the argument of the Court. In this view of the case, hardly any one will be bold enough to contend that, in making this sale to the appellant, all the parties did not understand that they were talking about *all* the assets which came to the hand of the assignee by virtue of the assignment in bankruptcy. The creditors desired "*a speedy settlement of the estate;*" and an examination of the documents found in the record relating to this sale, can leave no doubt that all the parties interested in, or to be affected by it, well knew that the supposed claim embraced in this suit, as well as all the other assets in the hands of the assignee, were to be conveyed to the appellant as the purchaser thereof.

FOURTH. EVEN IF THE COURT SHALL DECIDE THAT THE CLAIM EMBRACED IN THIS SUIT WAS SUCH AN ASSET OR VESTED RIGHT AS PASSED TO THE APPELLANT'S ASSIGNEE IN BANKRUPTCY UNDER THE ASSIGNMENT, AND THAT IT DID NOT AGAIN BECOME VESTED IN THE APPELLANT BY VIRTUE OF THE SALE MADE THEREOF TO HIM BY THE SAID ASSIGNEE, STILL THE APPELLANT HAS THE EXCLUSIVE RIGHT TO MAINTAIN THIS SUIT

AND RECOVER THE PROCEEDS OF HIS COTTON UNDER THE PROVISIONS OF THE ACT PASSED FOR HIS RELIEF.

The construction which the Court of Claims puts upon that act, renders it absolutely nugatory, and defeats the evident purpose of Congress in its passage. The Court of Claims decides: 1st. That the appellant's assignee in bankruptcy acquired no rights under that statute; and 2d, that it is ineffectual to afford the appellant any relief.

It is a well settled rule, in the construction of statutes, that *some effect* must be given to them if possible.

Sedgwick on Statutory and Constitutional Law, 238;
Commonwealth vs. *Alger*, 7 Cush., 53, 89.

And it is an equally well settled rule, that a statute must be so construed as to effect the object which the law-making power intended to secure by its passage.

Sedgwick on Statutory and Constitutional Law, 379;
Bartlett vs. *Morris*, 9 Porter, Ala., pp. 268, 269.

If the purpose of Congress in passing the act for the appellant's relief cannot be clearly determined from the language of the act itself, then the *title* of the act may be relied upon as an assistance in arriving at a correct conclusion.

Dwarris on Statutes, 502;
Sedgwick on Statutory and Constitutional Law, 50.

The act passed by Congress was for the relief of the appellant, and not for his creditors. He petitioned Congress for the passage of the act and the result of that petition was the passage of the act for his exclusive relief and benefit, although Congress was fully advised that, previous to the time the appellant petitioned Congress for relief, he had been adjudged a bankrupt, and had been discharged as such. The Courts will not permit the purpose of Congress to be defeated by awarding the money to strangers, when Congress clearly intended the relief granted to be for the exclusive benefit of the appellant.

Ogden vs. *Strong*, 2 Paine, C. C., R., 584.

his assignees in bankruptcy, or to his prior assignees; and that what may have come to him after his bankruptcy through the *voluntary action of the trustees*, under the terms of the discretion reposed in them, *is his lawfully, and cannot now be subjected to the control of his assignees.*"

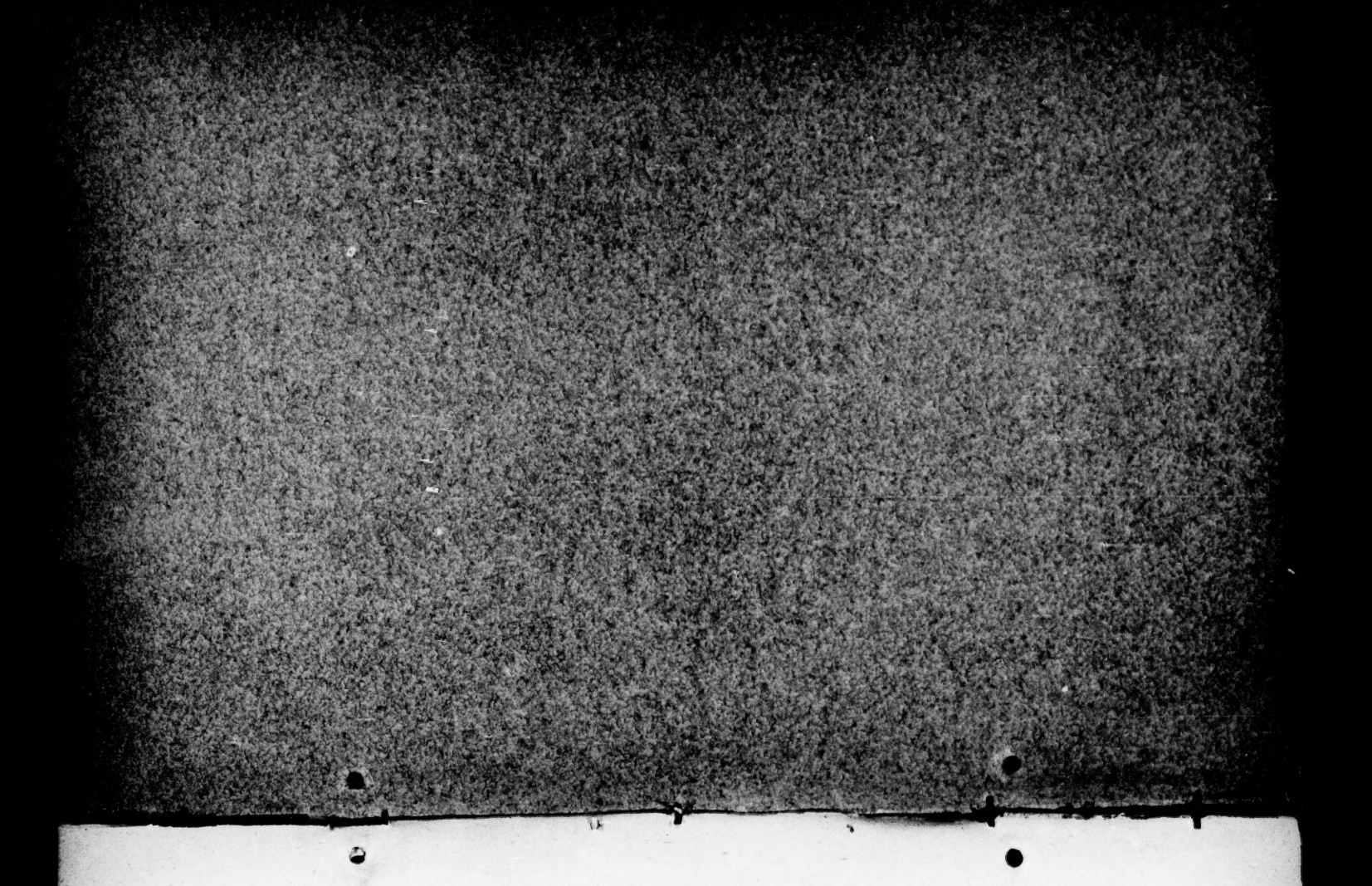
We could not more fittingly conclude the argument in this case. In *that* case the right had been forfeited by the bankruptcy of the devisee under the will, but he subsequently received out of the estate such sums as the trustees chose in the exercise of their discretion to award him. In this case the appellant's rights to, and the remedy for, the recovery of the proceeds of his cotton were both lost and forfeited by the failure of the appellant to avail himself of the statutory remedy. Congress, in the exercise of its bounty and discretion, restored to the appellant his forfeited right and remedy, and these thus acquired belong to the appellant, and not to his assignee in bankruptcy.

Ogden vs. *Strong*, 2 Paine, C. C., R. 584.

It is submitted, therefore, in conclusion, that the judgment of the Court of Claims should be reversed, and that this cause be remanded to that court with directions to enter a judgment in favor of the appellant against the United States for the sum of *forty-nine thousand six hundred and eighteen dollars and thirty-nine cents* ($49,618.39).

ENOCH TOTTEN,
Attorney for the Appellant.

JOHN. J. WEED,
of Counsel.



SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1876.

ROBERT ERWIN,

v.

UNITED STATES.

No. 707.

APPELLANT'S REPLY BRIEF FOR APPELLEE.

JOHN J. WEBB,
Of Counsel.

ENOCH TOTTEN,
Attorney for Appellant.

Washington, D. C.
[illegible]
1876.

United States Supreme Court.

OCTOBER TERM, A. D. 1878.

ROBERT ERWIN,

vs. *Appellant,*

THE UNITED STATES.

No. 701.

Appellant's Reply to Brief for Appellees.

First Point.

That the act passed by Congress for the relief of appellant, by its terms evinces a purpose to give the Court of Claims jurisdiction only over such claim as Robert Erwin already had; *not to make any new grant.* **It was merely to remove** *the statutory bar* **that had intervened without his fault. It gave no new** *grant* **to him, and none at all to anybody else. It conferred the personal privilege of prosecuting such claim as he had. The report of the judiciary committee in presenting the bill shows this. The facts of Erwin's bankruptcy and assignment were not brought to the attention of that committee.**

Dividing this proposition, we find it to contain the following suggestions:

1st. That the act passed by Congress for the appellant's relief gave the Court of Claims jurisdiction of such claim as the appellant had at the time of its passage; and that this grant was *exclusively to the appellant.*

2d. That the act was passed merely to remove the statutory bar, which prevented the appellant from prosecuting his claim.

3d. That the facts of Erwin's bankruptcy and assignment were not brought to the attention of Congress.

A.—The learned counsel for the United States does not assert that the appellant had any claim against the United States resulting from the capture and sale of his cotton at the time the act for his relief was passed. If he had asserted the existence of a claim in favor of the appellant *at that time*, he would have experienced some difficulty in defining what the claim was; since this court has repeatedly decided that the only remedy provided for such a claim was that which was to be found in the provisions of the *third* section of the captured and abandoned property act; that both the remedy and the right were derived from that act; and that each was dependent upon the fact that the owner of the property seized and sold, had availed himself of that statutory remedy "*within two years after the suppression of the rebellion.*" A failure to do that, forfeited both the *right* and the remedy.

Mrs. Alexander's cotton, 2 Wall., 422:
United States vs. *Anderson*, 9 Wall., 56, 71;
Ex parte Zellner, 9 Wall., 248;
United States vs. *Klein*, 13 Wall., 142;
Haycraft vs. *The United States*, 22 Wall., 94;
The Elgee cotton cases, 22 Wall., 185, 186;
Lamar vs. *Browne et al.*, 92 U. S. R., 198;
Chamberlain vs. *Stanton*, 2 Wood, 164, 166.

Again, this court expressly decided, in the case of *Haycraft* vs. *United States*, above cited, that the seizure of cotton which was private property during the late rebellion was authorized and lawful, and that the sale of such property, and the payment of the proceeds of the sale thereof into the National Treasury, did not create even an *implied* contract against the United States to restore such proceeds. The *right* and the *remedy* were exclusively and only statutory, and each was inseparable from the other.

Therefore, after the 20th of August, 1868, the appellant had neither a *right* to the proceeds of his cotton nor any *remedy* by which he could assert any claim to such proceeds. The United States never agreed to hold the proceeds of such property *in trust, even for loyal claimants*, beyond the two years specified in the act, which furnished both the *right* and the *remedy*. Even if the title of the original owner of the cotton was not divested by its *capture*, as seems to be conceded by this court in the case of *Klein* vs. *United States*, still the title of the original owner became completely divested upon the expiration of *two years from the suppression of the rebellion;* and after that time the right of the United States to retain such proceeds became complete, and such right could not anywhere be questioned.

In the case of *Chamberlain* vs. *Stanton*, above cited, the learned judge of the fifth circuit declared what would be the consequences resulting from a failure to pursue the statutory remedy, in the following language:

"The law never contemplated that a party claiming to be the owner of captured or abandoned property might recover the proceeds thereof after his claim was barred by the limitation of the statute by bringing suit therefor against a party who had by fraudulent practices received said proceeds from the United States Treasury. The *title* of the United States became abso-

lute upon the expiration of two years from and after the close of the rebellion, unless suit therefor was brought within that time by the real owner. According to the bill, no such suit was brought, and the right of the real owner was *forever* cut off."

2 Wood, 165, 166.

The right to recover such proceeds by suit in the Court of Claims was not *a continuing right.* It did not exist at all except in favor of those who availed themselves of the statutory remedy. The neglect or failure to pursue that remedy left those who were guilty of the neglect without either right or remedy. Such persons were in the same position they would have occupied had the abandoned or captured property act never been passed. As to them, there existed neither *right, remedy,* nor *trust.*

B.—The *time* for commencing suits under the "Abandoned or Captured Property Act" was a limitation upon the *jurisdiction* of the Court of Claims. It was not a statute of limitations, for it conferred both the *right* and the *remedy* by which the fruits of the right which it granted were to be secured. The act passed by Congress for the relief of the appellant, therefore, did something more than to "*remove the statutory bar.*" That act gave to him both the *right* and the means by which it could be enforced. As to the appellant, it was the passage *at that time* of the "Abandoned or Captured Property Act." Congress evidently intended, by granting to the appellant only such rights as were conferred by that act, *to limit the appellant's right of recovery in this suit to a restoration to him of the proceeds of the sale of the cotton which the United States had received into their Treasury.* If the grant of jurisdiction had been without this limitation, then the appellant could have recovered from the United States *the market value of his cotton at the time of its seizure,*

instead of the net proceeds. Therefore, we may assume that the purpose of Congress in passing the act for the appellant's relief was not only to give him a new *right of action*, but also to fix and determine the measure of relief which should be awarded under that act.

C.—The suggestion that the appellant *concealed* from the judiciary committees, and therefore from Congress, the facts of his bankruptcy and assignment, is not justified either by legal presumption *or by the facts.*

It may always be presumed that Congress *knows* the facts upon which it acts in passing bills for private relief. It would not only be an unsafe but an unwise presumption to assume that Congress passes such bills without knowing the facts by which their passage would be justified. A contrary presumption would lead to the constant nullification and defeat of the objects and purposes of such acts. So much for the legal presumption. As a matter of fact Congress was fully advised of all the facts relating to the appellants' bankruptcy and assignment.

But we do not consider this question in any respect material, and have only discussed it because it contained an intimation that the appellant had practiced some imposition upon the committees of Congress and by that means had secured the passage of the act for his relief.

Second Point.

Erwin had no claim. It had passed to his assignee in bankruptcy.

This proposition is supported by assuming that the cases of *Comegys* vs. *Vasse*, 1 Peters, 193; *Clark* vs. *Clark*, 17 Howard, 315; *Foot* vs. *Knowles*, 4 Met. (Mass.) 391; *United States* vs. *Hunter*, 5 Mason, 62, are analagous in

principle to the case at bar. Each of these cases, except that of *Foot* vs. *Knowles*, was examined by us in the brief which we heretofore submitted in this case.

The case of *Comegys* vs. *Vasse* was a case which arose under the provisions of the bankruptcy act approved May 4th, 1800.

It is appropriate therefore, that the attention of the court be directed to the provisions of that act in order that its comprehensive provisions may not escape attention.

The fifth section of that act provided that it should be the duty of the commissioners in bankruptcy, after the party had been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the said bankrupt may be entitled, either in law or equity, *in any manner whatsoever*, &c., and also to take into their possession and secure all deeds and books of accounts, papers, and writing belonging to the bankrupt; and shall cause the same to be safely kept until assignees shall be chosen or appointed."

By the eighteenth section of the act the bankrupt is required upon notice to surrender himself to the commissioners, and to sign or subscribe such surrender, and submit to be examined from time to time upon oath, and fully discover all his effects and estate, real and personal, and how and in what manner, to whom and upon what consideration, and at what time or times he has assigned or transferred, any of his goods, wares or merchandise, moneys or other effects and estates, and of all books, papers, and writings relating thereunto, of which he was possessed, or in or to which he was in any way interested or entitled, or which any person or persons shall then have, or shall have had in trust for him, or for his use, *at any time before or after the issuing of the said commission*, or whereby such bankrupt, or his family *then hath*, or *may have or expect any profit, possibility of profit,*

benefit or advantage whatsoever, except only such part of his estate and effects, as shall have been really and *bona fide* before sold and disposed of, in the way of his trade and dealings, and except such sums of money as may have been laid out in the ordinary expenses of his family, and upon such examination to execute all required assignments of his estate whatsoever and wheresoever to vest the same in the assignees.

Section fifty declares "that if any estate, real or personal, shall descend, revert to, or become vested in any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c., all such estate, shall, by virtue of thisact, be vested in such commissioners."

2 Stats. at Large, pp. 23, 26, 34.

Now, it is obvious, that under the provisions of this act every possible claim which the bankrupt might have, *or expect to have*, from any cause whatever, would pass to the commissioners in bankruptcy under the assignment. This court might with entire propriety, therefore, decide as it did in the case of *Comegys* vs. *Vasse*, that under the provisions of that act a claim against a foreign government for an *unlawful seizure*, was such a *possibility of* "*profit*," "*benefit or advantage*," as would become, upon indemnity being made therefor, an asset of the bankrupt's estate, and as such become vested in the commissioners of bankruptcy.

It must be admitted that there is always an obligation resting upon a government to demand satisfaction for the injuries committed by one nation upon the subjects or citizens of another nation. Injury done to a citizen is an injury done to the nation to which the citizen owes allegiance. The government is the instrumentality through which the injury done to its citizen is to be repaired and indemnity therefor obtained.

And it may well be assumed that injuries resulting from the *unlawful capture* of the property of a citizen for which the government making such capture would be bound to make indemnity would be regarded as such a "*possibility of benefit*" as would pass to the commissioners of bankruptcy under the provisions of that act. This court, in the case of *Comegys* vs. *Vasse*, declared that the question whether the right to the compensation for an unjust capture, for which indemnity was provided in the treaty between the United States and Spain, concluded February 22nd, 1819, andvested in Vasse, passed under the bankruptcy assignment to his assignees. And the court said:

"That this is a question free of doubt will not be affirmed by any person who has read with care the opinion of the court below. *The true solution of it must be found in a just exposition of the object, intent and language of the statute of bankruptcy of* 1800, C, 19."

It is clear, from the language and reasoning of the court in that case, that its decision is based upon the broad and comprehensive provisions of that bankruptcy statute; and that but for these the assignment could not have been sustained.

The case of *Clark* vs. *Clark*, resulted from an assignment made under the provisions of the bankruptcy statute, approved August 19, 1841, the *third* section of which provided as follows:

"That all the property and rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt who shall by decree of the proper court, be declared to be a bankrupt, within this act, shall byinoperation of law *ipso facto* from the time of such decree be deemed to be divested out of such bankrupt without any other act, assignment, or other conveyance whatever, and the same shall be vested by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose."

5 Stats. at Large, pp. 442, 443.

In that case it appears "that all the papers and evidence in support of Clark's claim against the Government of Mexico were not in the bankrupt's possession, but had been in the *year* 1842, *or earlier*, filed publicly before the commissioners appointed under the convention of April 11, 1839, and were afterwards placed; *and at the time of the commencement of the proceedings in bankruptcy* were of the public archives of the Government of the United States, and there remained until the time of said award."

17 Howard, 317.

If, as seems clear from the above statement of facts, the claim of Clark had been presented by him to the commissioners under the treaty of April 11th, 1839, it is apparent that he had not only *a cause of action*, but *a right of action* before a competent tribunal having jurisdiction thereof. And we will concede that if the same state of facts existed here, that is, if the appellant, at the time he became a bankrupt had *a cause of action*, and a *right of action* which he was prosecuting before the appropriate tribunal having jurisdiction thereof, such cause of action would have passed to the assignee under the late bankruptcy statute. But none of these facts exist here, and therefore that case is not an authority by which the appellees' proposition can be sustained.

But the statutes of bankruptcy under which these cases arose, were in every respect more comprehensive in their provisions than the late bankruptcy statute under which the appellant was discharged as a bankrupt.

Under that statute, it was only *rights of action* which existed at the time of the assignment, or rights of action for debts, or causes of action which subsequently became payable, and became *rights of action*, that passed to the assignee. This is obvious from the provisions of that act.

Section 5046 of the revised statutes of the United States, which contains unchanged all that part of section fourteen of the bankrupt law declaring in particular what property shall pass to the assignee of the bankrupt, reads as follows:

"All the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent-rights, and copy-rights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract, or from the unlawful taking or detention, or injury to the property of the bankrupt, and all his rights of redeeming such property or estate, together with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

The special portion of the section covering the question here at issue, supplying the ellipsis will read thus:

"And all his rights of action for property or estate, real or personal, and all his rights of action for any cause of action which he had against any person arising from contract, or all his rights of action for any cause of action which he had against any person arising from the unlawful taking or detention, or injury to the property of the bankrupt."

It is neither necessary nor useful to discuss what constitutes *a right of action*. It will be admitted without argument that unless there exists an *obligation* that will constitute the basis of a suit before some appropriate tribunal having jurisdiction thereof, there can be *no right of action*.

It is clear, therefore, that the decisions above cited, made under the statutes of bankruptcy of May 4, 1800, or of August 19, 1841, afford no aid in ascertaining the construction which must be given to the provisions of the fourteenth section of the late bankruptcy statute.

The case of *Foot* vs. *Knowles* was a case which involved the question whether the amount of the *pension* to which a widow became entitled in consequence of the services of her husband in the revolutionany war, and for which a certificate had been issued by the War Department, was an asset which belonged to the estate of the widow to whom the certificate was issued, or was rightfully paid to her heirs. The War Department issued the certificate to Prudence Foot, the widow, but she had died four days before the issuance of the certificate. The War Department, upon the facts being made known to it, directed the pension to be paid to the four heirs of the deceased widow. Suit was brought against one of the heirs who had received a share of the pension, by the executor of Mrs. Foot, and the court held that the pension payable to Mrs. Foot at the time of her death was an asset which belonged to her estate, and that the amount which one of the heirs had received could be recovered by the executor, notwithstanding it had been paid to such heir by direction of the War Department.

This was the case of money due and payable under the express provisions of an act of Congress, and would necessarily become an asset of the estate of the person to whom it was payable upon the death of such person.

Surely this case cannot aid the proposition for which the appellees contend. That was a case where money was due and payable under the express provisions of an act of Congress, and if the Court of Claims, as now organized, had existed at that time, Mrs. Foot could have

recovered the amount to which she was entitled under the statute by suit in this court, upon payment of the amount due, having been refused by the War Department, and a like right to recover the amount due would have survived to the executors of Mrs. Foot upon her death. The appellant, upon his becoming a bankrupt, was *civiliter mortuis* so far as there remained to him any right to institute any suit to secure rights which he had at the time he became a bankrupt. His assignee, who was in law the administrator of his estate, *only acquired the same rights that he possessed at the time he became a bankrupt.* It will not be difficult for this court to conclude that *at that time* the appellant had no claim against the United States resulting from the seizure of his cotton, *nor any right of action* against the United States which he could enforce in any judicial proceeding before any appropriate tribunal.

A very simple test for the solution of this question would be afforded by supposing that the United States had instituted in its proper court a suit against the appellant *subsequent to the 20th day of August*, 1868, for some supposed indebtedness due to them, and the appellant had plead as a set-off to such suit the fact that the United States had captured his cotton, and that the same had been sold under the provisions of the abandoned or captured property act, and the proceeds of such sale paid into the National Treasury; and that the amount of such proceeds exceeded the supposed debt of the United States, and that no suit had ever been instituted to recover such proceeds in the Court of Claims, as required by the *third* section of that act. It is very clear that to such a plea it would be replied that the seizure of the cotton was both authorized and lawful; that the title to the cotton seized had become absolutely vested in the United States, and that by reason of the neglect of the

appellant to invoke the jurisdiction of the Court of Claims within the statutory time, the right to such proceeds had been lost, and that therefore the appellant had no such legal or equitable right to such proceeds as would furnish him any basis for a set-off or cross-action against the suit brought by the United States against the appellant, and in such a case this replication would be held a complete answer to a plea setting forth that state of facts; and, upon *general demurrer*, such a plea would be held insufficient, as constituting neither a defense nor a sufficient plea of set-off.

Inviting attention, therefore, to the suggestions which we have heretofore submitted upon this question, and to be found at pp. 14 and 15 of our previous argument, we submit that the *second* proposition for which the appellees contend is not in any respect aided or sustained by the authorities cited for its support.

Third Point.

That the appellant did not acquire any right to the claim embraced in this suit by the purchase made thereof from his assignee in bankruptcy.

The appellant submits in reply to this proposition:

1st. That this suit being between the appellant and the United States, under a special statute passed for the exclusive benefit of the appellant, it is immaterial whether the sale of this claim by the appellant's assignee in bankruptcy to him was or was not a valid sale, since Congress, with full knowledge of the facts upon which the validity of that sale depended, authorized the appellant to prosecute this suit in his own name and for his exclusive benefit.

2d. That, as against the United States, under the pro-

visions of that special act, the appellant has the exclusive right to the proceeds resulting from the seizure and sale of his cotton, because no right is given under that act to any person or persons other than the appellant to contest with the United States the right to the proceeds of the said cotton.

3d. Even if the sale of this claim by the appellant's assignee in bankruptcy to him was irregular and *voidable*, still neither the appellant's assignee in bankruptcy nor his creditors can be heard, to contest the appellant's right to the proceeds of the cotton embraced in this suit, because the said assignee in bankruptcy, as well as the creditors of the appellant, acquiesced in the said sale and received the benefits thereof, and, without objection or protest, they permitted the appellant to prosecute this claim in the Court of Claims and before Congress, with the full knowledge that he was prosecuting it in his own name and for his own benefit after such sale to him. This fact is clear from the *fifth* special finding found by the Court of Claims at the request of the appellant.

Fourth Point.

That the refusal of the Court of Claims to admit the appellant's assignee in bankruptcy as a party in that court is not assigned as error, and, therefore, no exception can be taken to that action by the Court of Claims.

It is true no exception was based upon the refusal of that court to admit the assignee in bankruptcy as a party to the record in this suit. That fact was only referred to for the purpose of illustrating the irresistible *logic* by which the Court of Claims demonstrated that the passage of the act *for the relief of the appellant* was

only a bit of unmeaning pleasantry on the part of Congress, and done for the purpose of deluding the appellant into the belief that *he* had acquired some rights under that act; whereas, if the logic of the Court of Claims was conclusive, it was not intended by Congress that either the appellant, his assignee in bankruptcy, or the creditors of the appellant were to be benefited by the passage of that act. According to the construction given to the act by that court, no person acquired any rights under it, although, being a *remedial statute*, it ought to have received such a construction as would advance rather than defeat the purpose Congress intended to secure by its passage.

Fifth Point.

That it was probably the capture of this $50,000 worth of cotton that made the appellant a bankrupt, and that he ought not to be permitted to dismiss his creditors with a small dividend, and then receive back a competency for his own support.

That is a question in which the United States can have neither interest nor concern. It is irrelevant and immaterial here. It concerns only the appellant and his creditors, and they are not making that objection to the right of the appellant to maintain this suit. If they were, they would have taken in seasonable time such exception to the action of the Court of Claims in dismissing the petition of the assignee in bankruptcy as would have enabled them to urge these considerations here. What concern has this court with the question of the amount received by the creditors of the bankrupt firm of Erwin & Hardee? How can the discussion of such a question aid this court in determining the questions which *are* presented by this appeal? What evidence does the

record afford upon this question? It is very clear that nothing is to be found *there* which furnishes the slightest evidence upon the question whether Erwin & Hardee's "*dividends*" to their creditors were *large* or *small*. It is safe to assume that they were sufficiently large to satisfy their creditors, since we do not find them, or any of them, seeking to deprive the appellant of the benefits which Congress intended to secure to *him* by passing the act for *his* relief.

The judgment of the Court of Claims should be reversed and judgment rendered in favor of the appellant, notwithstanding the objections to that result contained in the brief filed on behalf of the appellees.

ENOCH TOTTEN,
Attorney for Appellant.

JOHN J. WEED,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

ROBT. ERWIN, APPELLANT,
vs.
THE UNITED STATES. } No. 701.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF.

In the Supreme Court of the United States

OCTOBER TERM, 1878.

ROBT. ERWIN, APPELLANT,
vs.
THE UNITED STATES. } No. 701.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S BRIEF.

The cause of the government will be submitted upon the statement of two or three simple propositions deemed so self-evident as to require no elaboration.

Robert Erwin owned cotton captured by the United States, and *once* had a claim to recover its proceeds (amounting to $49,618.39), under the captured and abandoned property act, by filing such claim in the Court of Claims at any time prior to August 20, 1868. He did file it there July 9, 1873. Learning from this court's decision in Haycraft's case (22 Wall., 81) that the statutory bar would defeat him, he applied to Congress which passed a bill for his relief January 24, 1877, which became a law without the approval of the President (19 Stats., 509). February 16, 1877, Erwin filed his amended petition under this act. The firm of which he was a

member (Erwin & Hardee) was adjudged bankrupt on their own petition filed December 31, 1868, and on the 12th day of January, 1870, the claimant was discharged as a bankrupt. Erwin & Hardee's assignee applied to the bankruptcy court, March 11, 1872, for leave to sell some *specified* choses in action "and any other notes uncollected," and "all uncollected open accounts on the books," &c., belonging to the *firm*. Finding a sale at auction would produce but little, the assignee, on the 7th of December, 1872, accepted an offer of Erwin to sell to him, at private sale, and acknowledged the receipt from him of $2,500, "being in full for all the remaining assets of the late *firm* of Erwin & Hardee, bankrupts, except the notes of Henry Schaben." The assignee (successor to the one first appointed) asked to be admitted to prosecute the pending claim, but the court refused to grant permission. In substance, the Court of Claims held that Congress only intended to remove the statutory bar, and to leave his claim, in all other respects, as it stood before; that Erwin had no claim because it passed to his assignee; and, in the exercise of its discretion, refused to admit the assignee to prosecute because he was not within the spirit or language of the act of Congress passed in 1876.

The court thereupon dismissed the petition.

POINTS OF ARGUMENT.

I.

The act of Congress of January 24, 1876, by its terms, evinces a purpose to give the Court of Claims jurisdiction only over such claim as Robert Erwin already had; not to make any new grant. It was merely to remove the

statutory bar that had intervened without his fault, as was represented. It gave no new *grant* to him; and no right at all to any body else. It conferred the personal privilege of prosecuting such (if any) claim as he had. The report of the judiciary committee, in presenting the bill, shows this (Record 5, Exhibit A). The facts of Erwin's bankruptcy and assignment were not brought to the attention of that committee.

II.

Erwin had no claim. It had passed to his assignee in bankruptcy (Comegys *v.* Vasse, 1 Peters, 193; Clark *v.* Clark, 17 Howard, 315; Foot *v.* Knowles, 4 Metc. (Mass.), 391; United States *v.* Hunter, 5 Mason, 62).

In the Gillis case, cited by claimant from 95 U. S. 407, it was conceded by me upon argument, and virtually admitted by the opinion, that devolutions of title by operation of law were not within the meaning or mischief of the statute construed. (95 U. S., 416, near middle of page.)

III.

This claim having passed to his assignee, Erwin could only acquire it as any other person would, by purchase. He did not buy it. All he bought, for which he paid $2,500, is clearly expressed in the receipt, *i. e.*, "for all the remaining *assets of the late firm* of Erwin & Hardee." The detailed statement of facts found shows that there was no intention on the part of the assignee to sell any individual assets, and that he had not this claim in mind; so the receipt expresses the exact truth.

IV.

The correctness of the refusal of the Court of Claims to admit the assignee is not put in issue. Mr. Erwin certainly was not aggrieved by having one who claimed an adverse interest shut out of court.

V.

Probably it was the capture of this $50,000 of cotton that made Mr. Erwin a bankrupt. Shall he dismiss his creditors with a small dividend, and then receive back an ample competence for his own support?

Calling particular attention to the opinion of the Court of Claims, the cause is submitted with these brief notes of our points.

EDWIN B. SMITH,
Assistant Attorney-General.

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EDWIN B. SMITH,
Assistant Attorney-General.

7 Otto 392
Oct. 7. 1878.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1878.

[redacted], *Appellant*,
vs.
THE UNITED STATES. } No. 701.

APPELLANT'S PETITION TO AMEND JUDGMENT AND ARGUMENT THEREON.

ENOCH TOTTEN,
Attorney for Appellant.

B. F. BUTLER & JOHN J. WEED,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1878.

ROBERT ERWIN, *Appellant*,
vs.
THE UNITED STATES. } *No.* 701.

To the Honorable Chief Justice and Judges of the Supreme Court of the United States:

The petition of Robert Erwin, the Appellant, in the above entitled cause respectfully represents:

1st. That the suit from which the above appeal was prosecuted, was instituted and prosecuted in the Court of Claims, under and by virtue of an Act of Congress, entitled "An Act for the relief of Robert Erwin, which was and is, as follows:

"That the Court of Claims may take jurisdiction, under the provisions of the Act of March 12, 1863, entitled 'An Act to provide for the collection of the abandoned property, and for the prevention of frauds in the insurrectionary districts within the United States,' of the claims of Robert Erwin, of Savannah, Georgia, for property alleged to have been taken from him, which claims were by accident or mistake of his agent or attorney, and without fault or neglect on his part, as is claimed, not filed within the time limited by said Act"

2nd. That on the 14th day of March, A. D., 1877, Lepine C. Rice, the assignee in bankruptcy of your petitioner, filed his motion in the Court of Claims for leave to be substituted, as the claimant in the said cause, then pending in the said Court, under the provisions of the said Act, in the name of your petitioner; but the said Court, on the 25th day of March, A. D., 1877, over-ruled the motion of the said assignee in bankruptcy, and refused to allow the said assignee in bankruptcy to become a party to said suit, or to prosecute the same as the legal successor or representative of your petitioner.

3rd. The Court of Claims afterwards, and on the 18th day of February, A. D., 1878, decided that your petitioner could not maintain his suit under the provisions of the said Act, because the legal title, as well as the right to recover the proceeds of the cotton, which that Court found to be in the Treasury as the proceeds of the sale of your petitioner's cotton had passed to, and become vested in your petitioner's assignee in bankruptcy; and that such assignee had the exclusive right to such proceeds as the legal successor of your petitioner; and from the judgment rendered by the Court of Claims, based upon that legal conclusion, your petitioner appealed to this Court.

4th. That this Court affirmed the above stated legal conclusion of the Court of Claims in the following language:

"The purpose of the statute passed for the relief of the appellant, as is manifest on its face, was to remove the bar of the Captured and Abandoned Property Act, which had arisen without his fault, ***or rather to confer jurisdiction upon the Court of Claims over his case which otherwise would not have existed.*** It was not intended to enlarge or affect his title to the claim, or to change his position in Court from what it would have been had he instituted his suit within the two years prescribed by that Act."

5th. It is admitted that your petitioner was the owner of the cotton, the proceeds of which are involved in this

suit, at the time of its capture by the United States; and that the said cotton was sold by the United States, and that the proceeds resulting from such sale paid into the National Treasury.

6th. That under the decision of this Court, and of the Court of Claims, no recovery of such proceeds can be had by your petitioner, under the provisions of the said statute, because the present legal right to recover such proceeds is vested in your petitioners assignee in bankruptcy; and that, therefore, the purpose of Congress in passing the above Act must be defeated, unless the assignee in bankruptcy of your petitioner be admitted as a party to the record in the above entitled suit, and be authorized to prosecute the same as the legal representative of your petitioner.

Your petitioner, therefore prays, that it may please your Honors to so amend the judgment, rendered herein, as to provide, that the judgment of the Court of Claims may be *reversed*, and that the record may be so amended as to give the right to prosecute the said suit, provided by the above Act, to your petitioner's assignee in bankruptcy; and that a mandate may issue from this Court upon such amended judgment, and record, directed to the said Court of Claims, commanding the said Court to render a judgment in favor of your petitioner's assignee in bankruptcy tor the amountof the proceeds in the United States Treasury, derived from the seizure and sale of your petitioner's cotton.

ROBERT ERWIN, *Appellant.*
ENOCH TOTTEN,
Attorney for Appellant.

WARREN C. STONE,
Attorney for Assignee in Bankruptcy.
B. F. BUTLER & JOHN J. WEED,
Of Counsel.

The proposed amendment is authorized by the 32nd Section of the Judiciary Act, which provides that:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, *in any of the Courts of the United States*, shall be abated, arrested, quashed, or reversed, for any defect or want of form, but the said Courts, respectively, shall proceed and give judgment according as the right of the cause and matter in law, shall appear unto them, without regarding any imperfections, defect, or want of form in such writ, declaration or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring, shall specially set down and express together with his demurrer as the cause thereof. And the said Courts respectively shall, and may, by virtue of this Act, from time to time, amend all and every such imperfections, defects, and want of form other than those only, which the party demurring, shall express as aforesaid, and may *at any time* permit either of the parties, to amend any defect in the process or pleadings upon such conditions as the said Courts shall in their discretion and by their rules prescribe."

1 Stats. at Large, p. 91.

The United States ought not to have derived any benefit from a defect in the want of the proper party to this record, because it neglected to take advantage of that fact, by *plea in abatement*. The appellant had a right to believe for *that* reason, that the case would be heard in the Court of Claims, on its merits, and without regard to any defect in the pleadings.

And it would be no objection to this amendment, even if it were proposed for the *first* time in the Appellate Court, and *after* judgment, for this Court expressly decided that question in the case of *Kennedy vs. The Georgia State Bank*, 8 How, 605, where, at page 611, the following language was used.

"There is nothing in the nature of an appellate jurisdiction proceeding according to the common law, which forbids the granting of amendments. And the thirty-second section of the Judiciary Act of 1789, allowing amendments, is sufficiently comprehensive to embrace causes of appellate as well as original jurisdiction. ***But it has been the practice of this Court, where amendments are necessary, to re-mand the cause to the Circuit Court, for that purpose.*** The only exception to this rule, has been where the counsel on both sides have agreed to the amendment. This has been often done, and it has not been supposed, that there was any want of power in the Court to permit it."

The case in which the above language was used was an appeal prosecuted from the United States Circuit Court for the District of Georgia. The cause was dismissed, for the want of jurisdiction, at the term of this Court, held in January, 1828. ***Two years afterwards***, and at the January term, 1830, the cause was re-instated on the docket, ***the record amended*** by avering that the appellees were citizens of the State of Georgia, and the cause remanded to the Circuit Court.

But if the power for which we contend, is not sufficiently established by these authorities, it is believed that this power was expressly conferred by the Act of June 1, 1872, which provides as follows:

"The Supreme Court may at any time in its discretion, and upon such terms as it may deem just, where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a Writ of Error, where there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, ***and in all***

other particulars of form, where the defect has not prejudiced and the amendment will not injure the defendant in error."—[Act June 1, 1872, ch. 255, sec. 3, 17 Stats. at L. 197.]

The power to make the amendments suggested by the appellants petition being conceded we come then to consider the question of the propriety of the exercise of that power in the present case.

OUGHT THE POWER OF THE COURT TO BE EXERCISED?

It was contended upon the argument of this case, on behalf of the appellant, not only in this Court, but in the Court of Claims, that the Act of Congress passed for the appellants relief, was an express grant to *him*, and to be exercised exclusively for *his* benefit and not otherwise. It was contended for this reason, therefore, that the assignee in bankruptcy could not be admitted as a party to the record and entitled to prosecute the suit in the Court of Claims, which was authorized under the Act passed for the appellant's relief; but the Court of Claims and this Court denied the correctness of this proposition, and held substantially that the passage of the Act for relief of the appellant, was, as to him, the passage at *that* time of the "Abandoned and Captured Property Act," and that his rights were to be determined in the same manner as if the suit had been brought within the two years prescribed by that Act. It must be conceded that had the appellant brought his suit in the Court of Claims under that Act, and had become a bankrupt either before or subsequent to its passage, or before or subsequent to the institution of his suit in the Court of Claims, that upon the happening, or the commission of the Act of Bankruptcy, his assignee, by opperation of law, would have become entitled to prosecute the suit which the appellant had com-

menced. This conclusion seems clearly to be sustained by the following language, in the opinion of the Court, delivered by Mr. Justice Field, where he says:

"The purpose of the statute passed for the relief of the appellant was to remove the bar of the Captured and Abandoned Property Act, or rather to confer jurisdiction upon the Court of Claims over this case, which otherwise would not have existed. It was not intended to enlarge or effect his title to the claim, or to change his position in Court, beyond what it would have been had he instituted his suit within the two years prescribed by that Act."

And again the Court in this opinion used the following language:

"When the appellant filed his petition in bankruptcy his claim against the Government was *property*, though of uncertain value. It was a claim for the proceeds of goods which once belonged to him, and of the possession of which he had been deprived by the action of the Government. Whether this was done rightfully or wrongfully does not affect the character of the claim as property, though it may affect its validity and value. A demand of a bankrupt which is outlawed must go to the assignee, for contingencies may arise in many ways which will give it a value. Demands against the Government, if based upon considerations, which would be valid between individuals, such as services rendered, or goods taken, are property, although there be no Court to investigate, or pass upon their validity, and their recognition may depend upon the will or caprice of the legislature."

This Court from these suggestions concluded that the appellant could not maintain his suit under the Act passed for his relief, because the present legal title, as well as the right to have the proceeds of his cotton had passed to his assignee in bankruptcy. The question we are now considering is one that might have arisen under the Abandoned

and Captured Property Act; and the question arises whether, if an assignee in bankruptcy had failed to assert his right to be made a party to the record in the Court of Claims, or if the fact of the bankruptcy of the claimant had in the first instance been brought to the attention of this Court, while an appeal was pending here, this Court would have affirmed the judgment of the Court of Claims, or *reversed* the judgment of that Court and directed it to amend the record and admit the assignee as a party.

These suggestions are specially worthy of consideration, in a case where the rights of both the appellant and his assignee would be utterly lost, if the Court should refuse to so amend its judgment as to afford a complete remedy for the enforcement of rights which would cease to exist because the time had passed in which they might be asserted. And the equities of this case is still more urgent, because this suit is brought to recover the proceeds of property held in trust by the United States, for the loyal owner thereof, which loyal owner the creditors through their assignee are—and *non constant* that the loss of this cotton was the cause of his bankruptcy.

It will be conceded that the appellant must have prosecuted his suit under the Act for his relief within two years after its passage; and his assignee in bankruptcy had under that Act only the same rights which he acquired; and these rights were of course to be exercised by either the appellant or his legal successor, within the two years prescribed in the "Abandoned and Captured Property Act."

Another suggestion which it seems appropriate to make is: That there is no deficiency or omission in the record which can deprive this Court of the information necessary to grant this petition, because it appears in the record, on

pages 6 and 7, that the appellant's assignee in bankruptcy, within apt and reasonable time after the passage of the Act for the appelant's relief, presented his petition to the Court of Claims, and prayed to be admitted as a party to the record in the said suit, and for leave to prosecute the same for the benefit of the creditors of the appellant. This motion, seemingly so appropriate, was denied by the Court of Claims on the 26th day of March, 1877. And the same Court, on the 18th day of February, A. D. 1878, without regard for the logic of its former decision, decided that the appellant could not recover, because the right to the proceeds of his cotton had passed to his assignee in bankruptcy.

Therefore this Court is possessed of sufficient evidence in the record to enable it to direct the desired amendment to be made. It must be apparent to the Court, that, if the petition now presented shall be denied, that neither the appellant nor his assignee in bankruptcy will have any rights under the Act passed for the appellant's relief, because more than two years have elapsed since the passage of that Act.

Such a conclusion, and such a result ought to be avoided if consistent with the exercise of the legal power which the Court possess.

This petition is pressed upon the attention of the Court for the purpose of avoiding an absolute and irremediable failure of justice. It is urged because there is left neither to the appellant nor his assignee in bankruptcy any other means by which a right, and a benefit, which Congress clearly intended to confer, shall be secured.

It is, therefore, made in the interest of justice, and would seem to call for the exercise of that discretionary

power which the Court may always exercise in furtherance of the interest and ends of justice.

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